SOME ASPECTS
OF THE THEORIES AND WORKINGS
OF CONSTITUTIONAL LAW

LECTURES ON THE FRED MORGAN KIRBY FOUNDATION FOR CIVIL RIGHTS

DEPARTMENT OF GOVERNMENT AND LAW
LAFAYETTE COLLEGE

THE MAKERS OF THE UNWRITTEN CONSTITUTION
By William Bennet Munro

SOME ASPECTS OF THE THEORIES AND WORKINGS OF CONSTITUTIONAL LAW
By W. P. M. Kennedy

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The Fred Morgan Kirby Lectures
delivered at
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TO

PROFESSOR M. D. STEEVER

and his colleagues in Law at Lafayette College
these Lectures are dedicated
as a small recognition of their kindness
to the author.

PREFACE

These four lectures were delivered to the students and to the general public at Lafayette College on the Kirby Foundation. They are printed as they were delivered and they make no claim to be a contribution to juristic or legal learning. The occasion on which they were delivered and the audiences to whom they were addressed have naturally coloured their form and subject-matters; indeed the latter were carefully discussed with many friends before the lectures were written. I hope, however, that they may serve in some small way in the interpretation of Canadian constitutional law and of the inter-relations of the British nations, and in this hope notes have been added. In preparing the lectures I have naturally fallen back on my previous writings and public addresses; but, as Professor G. M. Trevelyan has said, it is merely affectation to vary methods and words where the same thing has to be said again. On the other hand, I have carefully revised the subject-matter of each lecture and written each to suit the audience concerned.

I cannot let this little book go to press without

putting on record my deep appreciation of the kindnesses extended to me, during my visit, by the faculty and students of Lafayette College.

W. P. M. K.

University of Toronto,
May, 1931.

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ABBREVIATIONS

A. C.	Appeal Cases.
Cart.	Cartwright, Cases on the British North America Act.
C. B. R.	Canadian Bar Review.
C. H. R.	Canadian Historical Review.
C. L. T.	Canadian Law Times.
C. L. R.	Commonwealth of Australia Law Reports (from 1903).
D. L. R.	Dominion Law Reports.
S. C. R.	Supreme Court of Canada Reports (from 1878).
St. R. (Qd.)	State Reports, Queensland (from 1901).
T. L. R.	Times Law Reports.

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I

THE STATE AND THE LAW

THE STATE AND THE LAW

In addressing the assembled students of a college I have thought it well to speak on some subject which will be of importance to them as citizens. It has seemed to me appropriate in these days of stress—legal, moral, religious, social and economic—that I should direct your minds to something fundamental. I do not, indeed, profess to bring to you anything new, or to make any contribution to learning. I shall attempt rather to dignify the obvious, and to ask you to consider various matters in the light of present demands and of future developments.

As students, you study constitutional law and government in many aspects. You survey the workings of your own institutions, those of the United Kingdom or of Canada, and you learn something of comparative public and private law. For example, you can, I doubt not, distinguish various executive, legislative and judicial systems. Or, you can point out the position held by a contract or an *ex post facto* law in your own country and in some foreign states. Or, you may know the principles which guide the judiciary here or elsewhere. In

other words, you learn aspects of the comparative functionings of institutions and of the laws which govern them. You have dealt with individual states—*a* state here, *a* state there—and there lies mirrored in your intellectual consciousness a map of states. All this is, of course, of vast importance, especially if your comparisons have advanced beyond mere description to analytical examination. For comparative public or private law is of most profound value when it studies historical and social causes and social effects.

I wish in this lecture, however, to take you a little further and to put before you two questions: *not,* what is *a* state?, what is *a* law?; but, what is *the* state?, what is *the* law? In other words I wish you to consider that, behind each particular state, each particular law, there lies a political and social concept—*the* state, *the* law. I am moved to speak to you on this subject for reasons quite apart from its intrinsic importance. For example, there are abroad many loose and invalid ideas. If you speak of education, or of many of the complex social problems which confront us in modern life, one man will say: "the state ought to do this; the law ought to interfere." His neighbour, with equal emphasis, will reply: "that is no business of the state's; law must not touch my rights." And so you could go on, in an almost endless variety of opinion. When you get down to further question-

ing, you will nearly always find that the variety of opinion has a common origin in obscure thinking. To one citizen the state means the executive and the legislature—the government; to another the state means a glorified referee keeping the right in the battle for existence. To one citizen, the law is some obscure machine in which by some unknown means he is cabined and confined; to another, it has some vague metaphysical coercive authority which he obeys in reverence and devotion or in fear and trembling. In the midst of so much confusion, I shall try to put before you two fundamental questions: what is *the* state; what is *the* law? If we can, in some degree, clear the air by even suggesting answers we shall do much to place a particular state, a particular law, in its proper place, and to see its proper functions.

Before beginning our survey, it may be well to examine some of the reasons for the variety of views of the state and of law which meet us on every hand. Some of this variety is due to the emphatic claim to individual rights, itself a hangover from older conception of natural law, from which we have never completely freed ourselves, or rather never logically examined. Again, many conceptions of the state have in them some ingredient of renaissance sovereignty. Indeed, in our average Anglo-Saxon thinking about the state and about law, the confusing doctrines of

early puritanism, the eighteenth-century exaltation of liberty, the nineteenth-century doctrine of *laissez faire* are mingled in almost hopeless confusion to which lawyers have frequently contributed the shibboleths of unreality. We have, on the one hand, omniscience and omnicompetence and coercion—the governors and the governed; on the other, we have a kind of necessary toleration towards controls which we hate and cannot or will not understand. Or, we have that indifference bred of intellectual weariness or intellectual indolence which makes citizenship a barren desert, or an unguarded field where evil men sow the tares of public corruption. The days for clear thinking are come if the democratic state is to survive.

Again, we might lay much of the popular confusion or indifference at the door of political and legal nomenclature. For example, it would be possible to take the legislative debates during any session at Washington or Ottawa or London, or to examine any twenty or thirty modern books on jurisprudence or political science and to find the words "state," "nation," "community," "society" used either loosely or interchangeably. The same is true of "law," "authority," "order" or "command." Now, when we stop to think, this loose use of words is in reality to confuse the profoundest social concepts. It is well for us then to attempt to think clearly. I would ask you to for-

get popular phrases and popular confusions of which we are all guilty in a greater or lesser degree. As college students you have doubtless studied the great political theorists. You have seen the state conceived in terms of Aristotle and Plato, or as the great central dynamo through which all progress and freedom must come, or as the convenient policeman. It would be superfluous to recall the great historic discussions—indeed I intend consciously to avoid them. I merely mention them, however, to note that in most, if not in all, the definitions or descriptions of the state and of law which you have studied, we really are looking at particular states from which individual theorists have generalized. Here you meet an interesting point often obscured. Generalizations by "the man in the street" frequently differ in degree but not in kind from many generalizations by jurists and political scientists.

To approach our first question—what is the state?—we shall do well to clear the air somewhat by a negative advance. First of all, the state must not be confused with society. Historically society is antecedent to the state; and to-day society functions and controls in family and domestic relations, in universities and colleges, in religious and ethical foundations, and in countless other forms of discipline which will at once suggest

themselves, to which the state does not give birth and to which it does not necessarily lend vitalizing authority. Then, too, there are a myriad social influences, elusive but of tremendous regulative reality, which know nothing of the state's creative fiat; while the deepest emotions of society, those unseen subtle *nescio quids* which go to make up the cultural disciplines of what we call Americanism or Canadianism are beyond the state to make or to unmake: they are the inner foundations, the secret underpinnings of personality which in some inexplicable way preserve the national characteristics, which lend variety behind the social common denominator of humanity. Here indeed we can find—in this indisputable differentiation of controls—the real, the simple key to those historic struggles between church and state, between the things which are Caesar's and the things which are God's, between culture and politics, between autonomous social groups and legal organs. Society and its expressions and motives and inspirations and rules and disciplines must never be confused with the regularizing, the liberating, the directing of the political instrument. The state, the political organization, is a function of society—it is not society itself. In other words, we must think in terms of real values, and conceive of the state as a definite group-life, like family, or university or church; differing indeed profoundly in function

and related by authorities socially created to the other social groupings, but itself a form of relationship between social beings and established by society as a means to achieve certain purposes—not by any means all purposes; to carry out certain social ends—not indeed all social ends, for that would be to usurp the function of society which in reality the state can never do.

Differing, I have said, in function. How then do we differentiate the state from other social groups or associations? First of all, it is the association in a given territory and on behalf of society within that territory which exercises authoritative control through socially delegated powers of sovereign authority—its machinery functioning in executive, legislature, and judiciary as an agency of the social order for the social order. The state then has a position of immense and of creative importance; but we must always remember that it is a socially created association. We can discuss its sovereignty, its coercive law apart from needless and barren logic and dialectic, if we constantly recall its intrinsic nature. It is no longer necessary to ask where ultimately sovereignty lies, or to confuse law with absolute command. It is possible, when you recall what the state is, to remember that your church, or your university, arranges and rearranges the supremacy which it claims over its members; that the rules of your church or uni-

versity are not mere commands, but regulations which you create and change, either consciously or unconsciously, by your active membership or passive acceptance.

Take, for example, a university. It has its executive body, its rule-making organs, its judicial authorities, in some degree perhaps graduate and undergraduate control. It is spoken of as Lafayette, or Toronto, or Paris, or Harvard. These are no mere abstractions, no mere legal concepts. They are persons, human beings, united in association for the advancement of particular purposes of scholarship and learning in particular institutions.

There is in each institution an *underlying, essential* purpose which sustains its daily, sessional purpose; and there is also in the state an essential life behind its outward manifestations in political machinery. In neither case, however, must we confound the purpose with the means of its attainment. Each citizen, if he is a citizen at all, each university man, if he is in truth such, accepts the general essential purpose of the state, of the university, but not all citizens, not all university members will agree, or indeed can agree, on the daily functioning will through which the purposeful fundamental will is kept alive and transfigured and transformed in ever-recurring nourishment and energy. There may be in university or in state, daily rule by a majority, powers may be dis-

tributed and separated, or intermingled, or interdependent, but behind these mechanisms—for they are nothing more—must lie the real dynamic will—the will on behalf of the concept of the university, of the state. It is possible to speak of a sovereign parliament, of a sovereign people, provided that care is taken that the sovereignty meant is nothing more than the transmission along given lines at any given moment of the central creative and creating power, that nothing more is meant than the practical machinery which functions in reality only so far as it reflects the purposeful vital thing which is the will of citizenship to remain organized in *the* state; that substratum of willed active inter-related purpose, to which Maurice Hauriou, the professor of public law in the University of Toulouse, has recently drawn such challenging attention.[1]

Here then words like "constituted authority," "constitutional procedure" take on their proper meaning. We agree to obey, we agree to machinery, we accept the determined methods of government, simply because our creative will as citizens transcends our votes, our political party, or political affiliations, in order that the state which our society has created may continue and survive.

[1] See Hauriou, M., *Principes de droit public* (1st ed., Paris, 1910); and compare the second edition (Paris, 1916); see specially, *La Théorie de l'institution et de la fondation.* Cahiers de la Nouvelle Journée. No. 4. Paris, 1925.

And so we can accept, with philosophical realism, changes in parties or falls of governments, knowing that in no particular government is there anything of the sacrosanct nature with which confused thinking has invested political sovereignty. We may be disappointed, our emotions stirred, as parties and executives and legislatures change; but we shall be true political scientists in proportion as our citizenship rises above passing power, ephemeral superiorities, material prosperity, personal ambitions, individual greed, and is anchored securely on the rock of our adherence to the general concepts on which our society has formed our state.

Indeed, it is the reliance on this conscious or unconscious security of each citizen that gives to any legislature power to regulate, to any political executive administrative authority. The managing board, during its term of office, the majority in a meeting of any club or association, must feel secure that the daily purpose will be acceptable to the general purpose of club or association, otherwise dissolution will quickly take place. So in the state. No executive can carry on, no legislature can make laws, no judge can hear cases and give judgments, if there is not the will which transcends the ballot box. And so, the state is a political association formed by and within society for particular functions, and sustained behind the

necessary weakness of human machinery, because the society which calls it into being wills the state to endure, wills to its institutions coercive power.

I would ask you to note that I say "wills to its institutions coercive power." Thus it is not some mystical sovereignty that coerces. It is the institutions through their officers executing, not in indefeasible right, the laws and regulations which, however arrived at at any given moment, depend for their sanction on the purposeful will of the society. People are not coerced by governments, they are coerced by law—the political law of the society in the state. It is a platitude to say that every association binds by law according to its nature; and the laws created by the state have a function for the nature of the state and no further. It is true that there is a marked gulf between the laws of your club or your university and those of the state. You can escape the former if you will; but you cannot, and remain civilized, escape from *the* state by passing from *a* state here to a *non-state* there. The law of *the* state is the great universal law of civilized society.

And, here, it seems to me we may hope to gain some glimpse into the functions of the state by considering the nature of its law. A club, a university can afford, indeed risk, detail, as every university calendar in North America bears witness. But the state must deal in general principles

and above all along the lines of its *constitution*—the conception of the state which the society pictures whether in traditions, or in the common law, or in a written document, or in a blend of all three. The most that the state can effectively do is to maintain a legal system; and it functions best when it avoids meticulous legal detail. For its laws, fitting into the constitution, not only enable it to carry out those things which society commits to it as best able to perform, but on them depend the other myriad regulative functions of society in ordered purpose and harmonious exercise. Society gives force and authority to the laws of the state not merely for the public institutions and political machinery, but in order that the social groups, which lie outside the laws of the state, may carry out their creative social purposes. The laws of the state are not the laws by which society lives—they are only a part of them, as human personality seeks its goal down the ages among a thousand and one forces which bind and loose. For the state is neither of God nor of the devil, is neither sacred nor profane. It is neither the great leviathan of Hobbes, nor the metaphysical great "outside us" of Hegel. It is not a mere policeman standing on guard to see that we get our share of liberty and of rights, and that our neighbour gets his. The state is not the antithesis of the individual. There is no such thing as *man versus the state*. The state

is for man—man through the state: an association created by society for the purposes of men. In other words, the state is a great social engineer and its laws are its means to its ends, are socially created rules of social engineering. Its ultimate sanction is not force, but effective social function. It does not seek liberty as an end in itself, for there is no such liberty; but it promotes liberty in society where alone, in its outward expressions, it has existed and can exist. It is an answer to the needs of society, resting, however, on the only possible foundation—human personality, which moves ever on to its realization in the great antithesis that personality must exist and must advance in society.

Let us try, then, to come to closer grips with the law of the state. First of all we must be clear what law is *not*. We must not confuse it with some preconceived moral or ethical system; or, when we speak of the supremacy of law, must we erect it into an all-consuming tyrant. Law has necessarily neither any moral significance nor absolutist claim. When we place together "law" and "the state," we do well to recall that by "law" we must mean only those regulations which enable the state to carry out its peculiar functions. Those functions are certain varying and variable social functions, and law is not coercion as such, force as such; it is rather the political imperative which

society makes on us. It is like some principle in the physical world. Law is of the very essence of the state, the rule of its being. To call it a command, to see its essence in compulsion is like separating the physical material body from the principle of life. Within the state there is a rule, a necessity of the state's being, a process before which the citizen can claim neither conscientious scruple, nor differential nor discretionary treatment. The ultimate sanction of law is, as I have said, effective social functioning. The practical sanction is that it is impossible to be a citizen of *the* state and to be excepted out of *the* law; for otherwise there would be no state. Of course I need not emphasize once again that conscience and belief and cultural or economic associations have vast claims; what I wish to make clear is that within those spheres dedicated at any given moment by society to the state there must be generality and compulsion; and the socially recurring allocations of political and legal functions will change the content, but not the duty of daily obedience. In order, then, that obedience may be helped and encouraged it is, of course, necessary that the coercive law of the state proceed on known principles, which from certain points of view you call "due process," and we call "the rule of law." There must be a well-understood procedure, nothing arbitrary, a reasonable certainty, and above all general absence of political and

legal corruption. If these are wanting, no material progress or power can preserve the state. It cannot live. It is contradicting the laws of its being. It is merely disclosing a great social internal decay. I shall return to the functioning of law before I conclude; but at this division of my lecture I must refer to an aspect of law which always calls for interest before an American audience. I refer to constitutional law—the sustaining, directing law of the state itself. Here in the United States, you have, in a written document consecrated by faith in Pennsylvania and dedicated in the blood of your people, fenced off certain bounds in bills of rights, in constitutional limitations, in reserved powers. I, as a Canadian, find no less bounds largely in the unwritten common law. I would not, however, have you believe that I am among those of whom President Wilson wrote, who most admire your institutions because of their restraints on government.[1] I know the forces at work with you; and while we profess to find most emphatically in the common law what you profess to find in your written constitution, yet behind both professions, your constitution and mine, there lies, as President Wilson has said, no better safeguard than social wisdom.[2] You keep the form, we keep the many unwritten traditions; but in both our

[1] Wilson, W., *An Old Master and Other Political Essays* (edn. 1893), p. 135.
[2] *Ibid.*, p. 149.

states there is going on in constitutional law a process of reaction to the social life which makes your constitution of 1789 and ours of 1867 as vastly different from the constitutional conceptions of those far-off days as the social conditions of to-day differ from those of our national origins. This is inevitable. And yet it is of essential importance that we should never forget constitutional law, the law which guards the state.

There is then an aspect of my subject to which at this point I wish to draw your attention, and it is one to which Canada must soon give serious thought. Australia has already dealt with it; and in the United Kingdom a bill making comprehensive changes is already drafted.[1] The point to which I refer is this: if the state is an association, an instrument of society, its agencies cannot continue to claim any special immunities in law. Under the common law principles which still prevail in Canada, it is possible to proceed against the state only in contract, and that by the grace of the executive, and not as of right. In torts we have no procedure at all; and I may suffer trespass and damage to my person or property through the

[1] Kennedy, W. P. M., "Suits by and Against the Crown," in *Canadian Bar Review* (1928), pp. 329ff.; Hon. W. Nesbitt, in *Proceedings of the Canadian Bar Association*, 1929 (Toronto, 1930), pp. 102-3; Keith, A. B., "Claims by and against the Crown," in *Journal of Comparative Legislation*, 3 ser. x, iv, pp. 188ff.

negligence of a government servant and I may not be able to proceed against the department concerned. From its origin, Australia, with a fine sense of social values, abolished the whole common law rules, and there it is possible to proceed against the state in the same manner as against a private corporation. Suits against the state are conducted as though they were ordinary suits; and the court decides, not the executive official, whether state documents should or should not be disclosed.[1] The whole thing works admirably. For us on this continent I consider this a most important issue in constitutional law. It outrages all principles of justice and all juristic realism that the state, as an agent of society, should enjoy legal immunities differing from other associations. In addition, there is growing up with us, as with you, a whole body of administrative law. This is perhaps the outcome of complex social conditions which seem to demand some special procedure; but we may well ask ourselves if it is not in some part due to civic timidity strengthened, as Dean Pound has suggested in the preface to his Dartmouth College Lectures, by an "obstinate persistence in legal paths which have become impossible

[1] Cf. *Marconi's Wireless Telegraph Co.* v. *The Commonwealth,* 16 C.L.R. 178; *Griffin* v. *State of South Australia,* 36 C.L.R. 378; *Queensland Pine Co., Ltd.* v. *Commonwealth of Australia,* [1920] St.R. (Qd.) 121; *Robinson* v. *State of South Australia,* 47 T.L.R. 454.

in the heterogeneous urban industrial America of to-day." Such timidity and obstinacy he adds "have been driving us fast to an administrative justice through boards and commissions, with loosely defined powers, unlimited discretion and inadequate judicial restraints, which is at variance with the genius of our legal and political institutions." [1] Both here and in Canada, we must be on our guard lest our constitutional law be undermined by administrative boards and functionaries. In constitutional law then it is always necessary to look well to our defences, to keep a keen watch on the principles of constitutional law—changing and varying—but binding at any given moment, which say to the state that it must not transgress its bounds. We must see to it that no injustice is done under the survival of older principles, and that injustices do not grow up under newer administrative procedure.

With regard to the functioning of private law we watch with great interest American decisions. In the jurisdictions in which I live, whose law I teach, whose judgments I study, there are dim signs of slow but inevitable change. Our text-books reflect new conceptions and in some degree our law is taking on a social point of view. In constitutional law this is specially true, and the

[1] Pound, R., *The Spirit of the Common Law* (Boston, 1921), p. xii.

changes will emerge during these lectures; but in private law I could point out how the rule of "duty of care" is being extended in the law of torts, and how the minds of our lawyers are turning more and more to the social conception that "the exercise of a right which can have no purpose except the infliction of an injury on another is unlawful"; while the whole aspect of negligence is being widened. In the law of domestic relations a complete revolution is in progress which is leaving behind the older individualism. On all sides, we are applying social standards. In criminal law, in juvenile courts, in reformatories, in classification of prisoners, in application of the methods of medicine and psychiatry, we have made important and constructive beginnings, which will lead us far from a particular crime and its particular punishment to a conception of crime as a social evil which may be anticipated and prevented. On the other hand we must try to make certain that law does in *reality* carry out a beneficial social function, and that it is not allowed to reflect undigested principles or the untried theories of social cranks. There is a danger, against which we must always be on our guard—that of giving legal force to social solutions on which our information is as yet inexact and problematical. In Canada, we have so far, in a large degree, avoided experimentation in social hygiene such as has taken place

with you after your Supreme Court upheld the constitutionality, in 1927, of certain social statutes of Virginia. Certain wisdom has prevented us from translating the experimentations of scientific laboratories into the law of everyday Canadian life.

Among American jurists and lawyers, however, we watch far-reaching activities. The works of Dean Pound and of Judge Cardozo are read and studied with us, not merely because of their learning and brilliant suggestiveness, but because they contain the promise of legal progress amid the complex social problems of present-day life; and it is not without important social significance that your state, founded in the age of natural rights and individual liberties, should lead the Anglo-Saxon world in the progress of sociological jurisprudence. With us, in our teaching of law we place before the student fundamental questions, ultimately more important than the law itself: does the rule work or fail? how far is it a means to social ends? Our attitude towards law is that to which your great law schools, such as Harvard Law School, Columbia University Law School and Yale Law School, are giving an abiding and comforting strength. We see in law a functional service, an instrument of society. Our progress is slow, our legal traditions extremely conservative; and there are in our legal systems, as in many

other forms of social control, ancient and obfuscated features which are still far out of tune with the complex civilization of a modern state; but here and there I could point to judgments which feebly touch hands with social progress. Our great trouble, as it is with you, is the dead hand of legal precedent, and we are not, as you are in this connection, in the van of progress; but there are signs of change, and our younger lawyers are in close touch with your legal literature which has become a vast social advance-guard of legal reform.[1]

For, in forming a concept of *the* state and of *the* law and in deriving from it rational citizenship, the conclusion of the whole matter is that "no man liveth to himself"; that we enter "into life because we love the brethren"; that the state is a social association, which society entrusts with a social mission; that its essential instrument of law is one, *not* primarily of the individual's rights or of the individual's duties, but of social interests. The centre of all is emphatically a human personality—*a* man, *a* woman, *a* human being. For we maintain personality as something inviolate and incommunicable and ultimate; and, at the same time, we maintain that "self" must imply other

[1] On the subject-matter of these paragraphs, see Goodhart, A. L., *Essays in Jurisprudence and the Common Law* (Cambridge, 1931), Chapters I, II, III, VI, VII, XIII.

"selves." In a word, the individual and the social have a necessary reciprocal implication. With the individual, then, as the great centre, it is obvious that the social interests granted by society to the state cannot be permanent; and it is equally obvious, as the two greatest of modern French jurists, Michoud and Saleilles, insist that before law takes any interests within its protection there must be a previous comprehensive survey of social values.[1] Society must vary the interests consecrated by law, modify and change them, as society *in the individual* tests their value in fulfilling their social function—to bring to the state the high offspring of better and nobler individual citizens.

The socialization of law implies a great purpose, and it demands equally great responsibilities. In his latest book, which has just appeared, Professor Laski has an admirable sentence: "the legal imperatives of any state must always be conceived as a permanent essay in the conditional mood." [2] This is a point of view liable to be lost sight of as sociological jurisprudence gains adherents. There is always a danger that law may be called in aid for purposes of reform, which is not reform at all;

[1] Michoud, L., *La Théorie de la personnalité morale et son application au droit français* (1st edn., Paris, 1916); Saleilles, R., *De la personnalité juridique* (2nd edn., Paris, 1922); and compare, *L'Œuvre juridique de Raymond Saleilles* (Paris, 1914).

[2] Laski, H. J., *Politics* (New York, 1931).

and that highly organized and well-meaning groups of social theorists, with more money at their disposal than carefully sifted information or often than intelligence, may influence legislators in dangerous directions. Law is an "imperative"—but "conditional." There must be, on the one hand, a readiness to bring public and private law into functional agreement with social demands, and there must also exist in society that practical wisdom, the core of Greek political philosophy, which will prevent the creation of legal rules until the whole ground of economic, financial, social, political, and spiritual phenomena has been as carefully surveyed as their nature will allow. Law must not be created *in vacuo;* and above all it must not be taught *in vacuo,* apart from the other social sciences. The training of lawyers apart from history, economics, sociology, political science, and philosophy—as is too generally the custom—seems to me something like throwing a medical student into clinical work before he has acquired a competent familiarity with physics, chemistry, biology and physiology. The older "intellectual inbreeding," [1] as Dean Smith of Columbia University School of Law calls it, cannot continue in our law schools—with its inductions and generalizations from cases, with its hammering out legal con-

[1] *Report of the Dean of Columbia University School of Law for 1929* (Columbia University Press, 1929), p. 7.

cepts and hammering in legal data—unless indeed society is prepared to accept in law the necessary consequences of "inbreeding"—an increasingly useless, feeble, and sickly offspring.

I should like to illustrate what I mean. In Canada we have a series of statutes governing legitimation by subsequent marriage—an excellent social purpose to protect the child against public opprobrium and in cases of intestacy. Already, however, we hear of unfaced and unconsidered problems arising out of loveless legal marriages, where mother and child suffer more than even the child's legitimation demands. I am making no attempt to formulate any final judgment on the situation. I merely draw your attention to legislation aiming at a sound social end, which may not work out so wisely as well-meaning legislators have intended, because its various social implications were not as carefully explored as they might have been. Such marriages may impose on the man obligations to which he never in truth consents, which he never carries out. They may impose on the mother desertion, loneliness and immorality, and they may lead to the creation of worse moral and economic conditions than they were supposed to cure. Marriages to avoid illegitimacy, and marriages to legitimize may be full of greater evils than sociologists have considered.

In his recent book Dr. Flexner has a phrase,

which, it seems to me, sums up the function of a university. In a university must go on "the ceaseless struggle to see things in relationship." Nothing could be more profoundly true; and if law, in its reaction to social demands, is to be saved for the finer purposes which it ought to serve, I believe it can come only from a society permeated with the ideal of relationship to which Dr. Flexner refers. We must emphasize and re-emphasize the countless relationships which hold society together, condition its harmony and postulate the beneficial processes of its political and legal instruments. The protection, then, of social interests for and on behalf of the individual is too vital, too fundamental, to be moulded by unbalanced charlatans, ill-informed legislators, or judges trained merely in the mechanics of law. Before society, through its legal organs, takes a social interest inside the terms of a statute, or inside a judicial re-interpretation of the common law, trained minds ought to have correlated many purposes, surveyed many aspects. We must learn to create social machinery for making law, if law is to serve social ends. In other words, the processes of lawmaking must themselves be socialized in answer to the question, how far does the proposed statute, or proposed re-interpretation serve society? And there is no ready-made answer to this question; only the answer which can be given by the patient dis-

covery of social facts. The proposed measure or re-interpretation will serve society as law only in so far as it reflects processes of study to which legislators and judges must be trained. That work of the trained mind will come from those universities and colleges and centres of learning, and from them alone, whose sense of human relationships, as Dr. Flexner suggests, far transcends "courses," "subjects" or "credits." I cannot, then, place before you too strongly this function which you can perform. Indeed many of you may be called, if Canada is any guide, to serve society in congress, in houses of assembly, or as members of the judiciary; but, whether as citizens, or legislators, or judges, it must be your civic duty to support no legislation or interpretation which has not behind it the carefully sifted examination of social facts, to support no legislation or re-interpretation deduced from Newtonian sociology. For society moves on Darwinian lines; and its deepest, most creative, and most profound processes are those which preserve the past in the present for the purposes of the future—an unending process in the renewal, the transfiguring and the transforming of social traditions.

In conclusion—you are the heirs of great traditions. May I venture to recall to you some well-known words which Chief Justice Taft once told me had often served as a light to his feet and a

lamp to his path in many a political and legal problem? They are the concept of your state, its social picture: "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty"—under a constitution which is to be "the supreme law of the land." [1] Every American—the dead, the living, the unborn—the past, the present, the future—is a partner in this great expression of social aim and purpose. It will be your social function to take these words, as I have read them, placed together in faith many years ago in this Commonwealth of Pennsylvania—your political Ur of the Chaldees—"union," "justice," "tranquillity," "defence," "welfare," "liberty," "supreme law"—and to shoot them through, to galvanize them into life with the palpitating social demands of the twentieth century. You will listen as theories and philosophies of society, of law, of the state move among you, for the state and the law react always to the social theories and social philosophies—an aspect of my next lecture. The call to-day is the brilliant call that Elihu Root addressed to the American Bar in 1916: to work out formulæ through which old principles may be applied to

[1] Cf. Edmund Randolph's remarks on the "preamble" in Farrand, M., *The Records of the Federal Convention* (3 vols. New Haven, 1911), vol. ii, pp. 137ff.

new conditions; through which, as he said, *the* state and *the* law may serve *their* society.[2] I cannot urge any better method of preserving the creative force of those words which I have read from the American constitution than by reminding you that "government *of* the people, *by* the people, *for* the people" can only endure and progress as each citizen, in his own individual life, learns to balance, to discipline, to control, to reconcile those myriad interests which wage war within the secret depths of each personality; as each citizen has newer births of freedom under God; and freedom is the great paradox—*servare est liberari.*

[2] Root, E., *Addresses on Government and Citizenship*, p. 533.

II

THEORIES OF LAW AND THE CONSTITUTIONAL LAW OF THE BRITISH EMPIRE

THEORIES OF LAW AND THE CONSTITUTIONAL LAW OF THE BRITISH EMPIRE

No apology is needed, before a university audience, for uniting theories or philosophies of law with certain aspects of constitutional developments. It is a commonplace of history, since the earliest organized civilizations, that theories of law have had profound influences on political change. Jurists, political scientists, statesmen and theologians have argued down the centuries about the sources of law, its purposes and ends, its functions and limitations, and all law has been, and indeed is, explicitly or implicitly the product of some prevailing philosophy or social theory. I need not, then, elaborate this introduction; nor need I discuss the consequence of such processes as revealed in constitutional history. It will serve my purpose if I merely mention them by way of making clear why I link certain theories of law with the constitutional law of the British empire.

It is, however, necessary for me to ask you to bear with me while I make some broad generalizations concerning the development of English law.

Much of what I shall say will be perfectly well known to you as students of political science, of government, of constitutional history and of law; but I hope to place it in a setting and relationship, which are, I believe, a necessary part of an historical understanding of the modern British empire. In the middle ages, as you are aware, the struggle of law lay with broken and overlapping jurisdictions, with local, even parochial, allegiances, with rival customs and traditions. The royal law—the law from the feudal monarch—finally worked down from him through his council to the country at large and became the *common* law—the law of the *commonality*, the *community* of England. We may well ask ourselves why it succeeded. Here was a land honeycombed with various organized groups—feudal, economic, social, religious—each making authoritative demands on its members; and these were all the more severe owing to the lack of facilities for the widening of intercourse and of social knowledge and understanding. And yet the common law not only gained the final victory, but acquired a position of extraordinary reverence and admiration. Undoubtedly the great underlying cause was the desire for security. Sickness, famine and sudden death stalked the land. Local authorities, whatever their nature, were liable to be capricious, and men were ultimately drawn into a general jurisdiction which promised

by comparison uniformity and security in the administration of justice. The common law, too, owes much to English feudalism. When the Normans re-organized the Anglo-Saxon type, and the king as head of the social system was bound to the meanest landholder on terms of mutual obligation, it was no hard deduction to argue that the same man as head of the political system should be bound to the people by analogous ties—his law was the common evidence in the constitutional field of his administrative obligations.[1]

So successful was the development that the common law itself hardened into a theory or philosophy, impatient of rivals, whether in the peculiar form of "the royal conscience" in equitable jurisdictions, or in any generally accepted claim that it owed respect to parliament. Men thought of the common law as something endowed with sanctity; and as the middle ages drew to a close this sanctity had almost developed into a religious rigidity beyond the scope of vast substantive change. Here, it appeared, was something delivered from the Sinais of history, amid the thunders and lightnings of tradition, hallowed with dignity, and embodying the most profound principles of reason. Here law finds itself idealized; for is it

[1] Cf. Bracton, f. 5b, "Ipse autem rex, non debit esse sub homine sed sub Deo et sub lege, quia lex facit regem"; and Fortescue, *The Governance of England* (ed. Plummer, Oxford, 1885), pp. 109ff.

not the natural god-given reason of man developed, expounded, glossed, hammered and toughened by generations of English experience? Before parliament it professes to stand undismayed; for the common law is supreme, and parliament is a court, one of its functional instruments. I want to emphasize, but not to over-emphasize, the situation, as has, I think, been done by some modern writers. As I see it, at the middle and close of the fifteenth century, a struggle had begun; but no one can read the Year Books of the period without being convinced that parliament had as yet no generally acknowledged sovereign capacity. Parliament declared the common law, perhaps applied rules where the common law had not spoken. But above the whims of kings, above the policies of legislators, above all claims on constitutional allegiance, the law claimed to stand in its own right. The law was sovereign.[1]

Even in the sixteenth century, there was no universal recognition of parliament as a rival to the great legal foundation. I have no doubt about this. You see it clearly in the legal theorists and in the practical lawyers, and it illuminates the first book on English public constitutional law, Sir Thomas Smith's *The Commonwealth of Eng-*

[1] Cf. however, Plucknett, *Statutes and their Interpretation in the Fourteenth Century* (Cambridge, 1922); Allen, C. K., *Law in the Making* (Oxford, 1930), pp. 262ff.

land.[1] More important still—and a point overlooked too often by historians and lawyers alike—is the theological literature which supports my position. On the other hand, Henry VIII and Elizabeth so wisely used parliament as the "body" of an organic commonwealth of which they were "heads," [2] that their skill not only amounted to genius, but, what is of importance for my present purpose, parliament grew in political power and in legal claims. Indeed, no institution such as parliament could work with monarchs so endowed with statecraft without acquiring an enormous potential authority and prestige, especially in an age when Bodin and the French *politiques,* when theologians, Roman Catholic and Protestant, had begun to define sovereignty (*horresco referens*) and to argue the foundations of political absolutism. Elizabeth herself had lost popularity at the close of her reign, and parliament was not slow to warn James I on the footsteps of the throne that much had been tolerated in her on account of her age and sex.

The Stuarts, however, had no ingredient of Tudor political wisdom. Never understanding the Tudor system, they were willing indeed to be kings by divine right, but entirely without the Tudor skill in interpreting their position. A con-

[1] See McIlwain, C. H., *The High Court of Parliament and Its Supremacy* (New Haven, 1910).

[2] Holinshed, *Chronicles* (4to edn., 1808), iii, 824.

test was inevitable. How was the issue faced? Sir Edward Coke and the common lawyers sought security in the common law. I know well that the weight of modern scholarship is quite correct in its insistence that the courts did not recognize this position; and I am afraid that not a few scholars have got their conclusions out of historical focus in neglecting the law reports. Be that as it may, it is sufficient for my present purpose merely to recall to your memory that almost naturally the common lawyers fell back on and argumentatively elaborated the theory which had largely survived the Tudor period, that the common law was fundamental, above and beyond either king or parliament. The latter could declare it or create rules in new sets of conditions. In the common law were Englishmen to find their inalienable rights; within it judges found the law. Somewhere, somehow, in its generality, the theory would provide judicial results. The old theory of the common law was called in aid to serve contemporary political ends.

To this fundamental conception was added something more. There now appears another generalization. The fundamental law of Englishmen is the law for "the abstract reasonable man," armed in the doctrine of precedent, or provided with a change as judicial reason and wisdom argue out new fashions, in deductions, in glosses, in statutes of fulfillment or exposition. Nor was this the

end. The reasonable man of the fundamental common law was not left to the profession. The theological jurists made their contribution and added stern Hebraism to his outfit. For them man was a free creature—a unit to be eternally saved or lost. He came into this world endowed with indefeasible and natural rights, gifts of the divine wisdom, ever-present in the omnipotent will, and handed to each soul at the moment of conception. Kings and thrones, dynasties and empires, human laws and customs were but dust before the individual for whom the all-wise God had prepared natural rights in his eternal and inscrutable purposes. The laws of men had no validity if they touched these natural rights; and the state existed by contract and consent to preserve and to develop them.

To the absolutism of kings a challenge was thrown down. Parliament took up the constitutional struggle. As yet no one saw the issues; but common lawyers and puritan theorists felt that the divine right of kings exhibited in living monarchs must be met with some kind of concrete institutional instrument such as parliament. They rewrote a large measure of English constitutional history. *Magna Carta* was torn from its context and transformed from being a retrograde and stagnating feudal charter of franchises, of *libertates,* into a bulwark of English liberty; the Lancastrian

constitution took on a vitality and working scheme totally divorced from the facts. Common lawyer and puritan and "reasonable man," *Magna Carta*, the fifteenth-century constitution, the fundamental common law and natural rights—all charged at Marston Moor and Naseby under the parliamentary standard, and haunted the purlieus of Whitehall on January 30, 1649, when the blood-stained scaffold of the king witnessed to their amazement in victory.

The execution of the king merely marked a period. Parliament had won; but its triumph was not absolute. The army offered a fundamental constitution, and even the Cromwellian *Instrument of Government* bore witness alike to the theory of the common law and to the theory of natural rights. I need not, however, follow the well-known history. Political conditions made for the growth of parliamentary power, ending under James II in a legal theory of his abdication and in a new parliamentary monarch. It was a "revolution" indeed—"glorious" or otherwise. Parliament now appears clothed with the theory of legislative omnicompetence and supremacy. Challenges come from Ireland to which I shall return; and doubts appear even in parliament itself, as the Triennial Act and the Act of Union with Scotland bear witness; but by 1763, when Blackstone wrote "what parliament doth no authority on earth can undo,"

everyone in the United Kingdom accepted the theory. I am not at the moment prepared to discuss its worth as a permanent contribution to juristic practice. It is sufficient to say that it satisfied immediate needs in the municipal constitutional law of England, and that it was an entirely new legal principle—a revolution. It soon became as venerated as common law or natural rights; and in the stagnation of the succeeding age, men looked on the *status quo* with reverence, and honoured 1688 as the product of the highest wisdom, as the perfection of institutional genius, especially as executive authority passed slowly from the crown with the beginnings and growth of cabinet government.

And now will you bear with me as I attempt to carry your minds over well-known history, to recall the years 1620-1763 and other developments outside the United Kingdom, to which I gave special study many years ago for purposes which will appear later? [1] As you know, oversea communities had begun, grown and prospered. Their legal

[1] For a discussion, see McIlwain, G. H., *The American Revolution* (New York, 1923); Adams, R. G., *Political Ideas of the American Revolution* (Durham, N. C., 1922); Schuyler, R. L., *Parliament and the British Empire* (New York, 1929); Stock, L. F., *Proceedings and Debates of the British Parliaments Respecting North America* (Washington, 1924); Coupland, R., *The American Revolution and the British Empire* (Oxford, 1930); Keith, A. B., *The First British Empire* (Oxford, 1930).

position was somewhat ill-defined; and I have, in my work, sought in vain to work out a general constitutional formula. Plantations, charter, royal, or prerogative colonies—call them what you will—it would seem at first that as far as they had any legal relationship with the mother country it was with the monarch. But with the execution of Charles I a new situation arose. There was no king, and his oversea estates—for so the Commonwealth vaguely conceived them—passed to parliament. I want you to note the setting, which, I venture to suggest, has been obscured by several writers who have reviewed this history—a setting most important for the purposes of this lecture. It is in mercantilism—the economic aspect of renaissance sovereignty—that the new idea appears. The dominions and oversea territories are, it is true, annexed to the commonwealth of England to be governed, as "belonging to England," "subordinate to and dependent" on her, by whatever laws and authorities the realm of England shall establish. This Cromwellian navigation code—an economic regulation—passed into the great act of Charles II; but I almost think that at the moment few of the colonists took much heed of the constitutional implications; the dead king's estates now belong to and are subordinate to the realm of England to fit the dominions and territories of the crown into an economic unity. The colonists recognized, I

think, the mercantilist system; but as I see it they did not profess to assent to the legal and constitutional principles involved. They had, however, no part in the civil war of constitutional theories which distracted England in the seventeenth century. They were common law men, they were strongly puritan, and if they had a theory of law at all it was that which they and their fathers took from England: the conception of a fundamental common law as laid down by Sir Edward Coke, to whom they always paid homage, fortified by the metaphysical or theological theory of natural rights. In a word, the roots of their jurisprudence —in so far as they had one—were in the middle ages, were in Tudor England, in the seventeenth century. I have tried to find in the colonial history of the period any idea that the colonists really grasped and understood parliamentary sovereignty, let alone accepted it.[1] It is true that the Whigs in 1688 invented an absolutely new coronation oath for William III. For the first time in English history a monarch swore: "to govern the people of the kingdom of Great Britain and the dominions thereunto belonging, according to the

[1] For an important discussion of parliamentary sovereignty and of parliament's position as a "high court," see Professor F. H. Relf's introduction to *Notes of the Debates in the House of Lords Officially Taken by Robert Bowyer and Henry Elsing, 1621, 1625, 1628.* (London: Royal Historical Society, 1929.)

statutes of parliament agreed on and the respective laws and customs of the same." But the oath, to which I shall return in another important connection, like the constitutional and legal implications of the economic system of the empire, passed unheeded; perhaps the colonists never heard of it. Indeed in England itself during the period there was little discussion of the legal ties of empire; and such as there was did not serve to illuminate the situation. The revolution of 1688 had satisfied the political aspirations of England; it undoubtedly resulted in a legal depreciation of the colonies. Commercial subordination was their legal fate at the restoration of 1660; political subordination was their legal fate at the revolution of 1688. But the years passed slowly with little understanding, legal or otherwise, of the maturing problems heavy with constitutional destiny.

Almost suddenly the colonies assume an importance, as Chatham's grandiose schemes challenge France on this continent, and, with the fall of Quebec in 1759, men woke up to find an empire on their hands in which there had developed two mutually opposed theories of law. I need not enter into the details. Parliament prepares to tax the colonies and the colonies prepare to resist. It is immaterial that the tax was small—so was Hampden's ship-money. It is immaterial that the legal problem narrowed down to a mere phrase in an

act of parliament. What had happened was that for the first time the legal theory of 1688 had projected itself beyond a coronation oath, beyond mere regulation, in actual *unacceptable* legislation *outside* England, and there it met theories older and certainly more traditionally English. I want very specially to emphasize the situation. The actions of parliament were for the colonies the outward and visible signs that in strict *English* law they were under parliamentary sovereignty; to which, though it satisfied the domestic constitutional life of England, they had never consented and to which they had contributed no organized recognition. It was all very well for parliament to call into action its sovereignty:

"I can call spirits from the vasty deep"—(said Glendower).

"Why so can I, or so can any man; but will they come when you do call for them?—(answered Hotspur).

Parliamentary sovereignty now faced the test of all law—social acceptance, the social reaction which it produces—those tests which I suggested in a previous lecture. The colonists had, I believe, if not an arguable legal case, at least a case more than arguable in social validity. Doubtless they bolstered it up, as their fathers before them had done in England when fighting royal sovereignty,

by extravagant appeals to natural rights; but in their appeal to fundamentals, to the supremacy of the law, they at least touched hands with the middle ages, with the Tudors, with England before 1688.

I do not intend to examine all their claims which you so well know, brilliantly argued by the soberest and wisest of their lawyers, and analyzed, I think, in the most objective way by Professor Corwin.[1] In their appeal to natural rights the colonists drew from John Locke the broad generalizations with which he built up the case for the English revolution as establishing a state founded on a social contract and consent, where the natural rights of each citizen were voluntarily and freely preserved. I would, however, emphasize the constitutional claims, for I conceive that the colonists were on sound social grounds of constitutional right before the Declaration of Independence. These claims may be summed up in one historic phrase: "there are some things that parliament cannot do." Beginning with the Stamp Act Congress there is a note of warning: Parliament, it declared, has a general and indisputable superintendent power, "so far as is consistent with the enjoyment of our essential rights as freemen and as British subjects." Note well the words—"essential rights." With the stiffening of legal theory in

[1] 42 *Harvard Law Review*, pp. 149ff., 365ff.

England those words acquired a tougher meaning in the colonies, until John Adams declared "we never thought parliament the supreme legislator over us." The authority of parliament "without our consent," declared Massachusetts, is contrary to "unalterable right in nature engrafted into the British constitution as a fundamental law." On all sides—and may I emphasize this point for the sake of modern developments?—there was wide enough loyalty to the king, but to him acting in his legislative capacity for each colony through its assembly. Seeking a principle of unity before the judicial and legislative functions of parliament were as clearly separated as at the revolution of 1688, the colonial lawyers fell back on the old English theory that law was declared, not made; and they argued that in every civil community there must be some constitutional foundations, otherwise there was no protection against an arbitrary parliament as there was none against an arbitrary king. In other words, to the theory of parliamentary legislative supremacy over dominions "belonging to England," they replied that they never "belonged to" England, never were "our colonies," and that for them there were rights in sovereign law; and that law was the law to which Coke appealed as guarding the fundamental privileges of Englishmen. Thus you have two totally incompatible legal theories of empire.

Now how was the American theory met? In law by a *non possumus*. It is perfectly true that Chatham rejoiced "that America had resisted"; that Burke lavished on the colonial cause the brilliancy of his magnificent oratory and gave phrases and idioms to our political tongue which will continue to stir the hearts of freemen as long as the world shall last. Laws (he argued), instructions, regulations do not make an empire; they are dead instruments in face of the airy ties of liberty. But neither Chatham nor Burke yielded the legal theory of parliamentary sovereignty, though the latter thundered that, were it insisted on, the colonists would throw it back in the face of parliament. And it is this point which I want to drive home. The British position was founded on a legal theory clearly enunciated in the Declaratory Act of 1766: the king in the parliament of Great Britain, "had, hath, and of right ought to have full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever," words borrowed *mutatis mutandis* from the Irish Declaratory Act of 1719. As in Ireland so in the colonies. The Americans fell back on the theories argued in the Irish case: the king hath full power and authority to bind this kingdom of Ireland by laws and statutes passed in the leigislature of the

same. Indeed I may say that when the drafts of the Irish Free State constitution passed through my hands, I found that the traditions of the Irish Declaratory Act and of its literature were so strong that that constitution became law as the only constitution of the empire with a bill of rights.

Be that as it may, in those fatal days, 1766-1776, the destinies of empire passed into a mere question of obtaining the soundest British legal opinion. No one seemed to see that there were two theories of at least equal worth. One barren demand was made—what are the legal powers of parliament? Beyond that, the fate of empire was as nothing. One jurist alone however stands out, and he deserves a place which ought to receive from some modern scholar its due evaluation. I refer to Charles Pratt, Baron Camden, Lord Chief Justice of the Common Pleas, and afterwards Lord Chancellor. You doubtless know him from your documentary study of English constitutional law as the judge who invalidated "general warrants," who released John Wilkes on *habeas corpus*. He was better known perhaps as the great lawyer who in certain important aspects anticipated the British commonwealth of nations, who saw the colonial theory in something of its historic settings, and who said: "My lords, he who disputes the authority of any supreme legislature treads on very tender ground. In my opinion this legislature

has no right to make this law. The sovereign authority, the omnipotence of the legislature, is a favourite doctrine; but there are some things which you cannot do . . . [of such is this bill], the very existence of which is illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution," [1]—words which I could parallel from many a parliamentary debate and public address in recent years. The record tells us that the lawyers burst into laughter at the insolence of Camden's utterance. There were constructive *colonial* ideas abroad, magnificent *colonial* conceptions to which I shall return; but against stubborn law, social facts then, as often now, alas beat in vain. Camden had no supporters—"among the faithless, faithful only he." The tragedy deepened, passing from constitutional grounds to political separation. Theories of law wrecked the first empire; two theories—one held by the king's subjects in Great Britain, and the other held by the king's subjects in America—and the former were so wedded to legal theory, so obsessed with juristic doctrine, that they could see nothing in the colonial theory but a subject matter for laughter in the house of lords.

Were any lessons learned? We now come to the period 1791-1849, so intimately connected with

[1] *Parliamentary History*, xvi, pp. 161ff., 177ff.

Canadian history—a history admirably told by Professor Wittke of Ohio State University. May I illustrate from Canadian history in connection with my subject? In 1791, when Upper Canada and Lower Canada were given representative institutions, the members of the legislature were for the first time in history compelled to take an oath which strengthened the power and authority of the parliament at Westminster as against royal allegiance.[1] Pitt made good use of the coronation oath of 1688 to which I have referred, and it became in substance an oath for members of the colonial assemblies—the very essence of the American revolution. Pitt was determined that the new empire would not be able to draw fine distinctions between allegiance to the sovereignty of the British legislature and allegiance to the crown. The results were exactly similar. As early as 1810 the government of England is meeting colonial claims with a complete scorn of previous events not a quarter of a century old, and meeting them in the same manner.

And so the history goes on: the British North American colonies, at the rim of empire, grow in wealth, in population, in maturing political experi-

[1] The Constitutional Act of 1791 (31 George III, c. 31). See Kennedy, W. P. M., "The Conception of the British Commonwealth" in *Edinburgh Review*, April, 1924, pp. 227ff.; and compare Soward, F. H., in 5 *Canadian Historical Review*, pp. 331-2.

ence, with the consequent demands for political freedom, while at the centre the law remains enthroned in all the glory of its rigid stupidity. The community and the law are once more divorced. And, as in 1776, so in 1837, you have the Canadian rebellions—the tragedy of blood—the blood of Upper Canadian and of Lower Canadian rebels was drained to a common earth, and it joined the same political stream as flowed at Lexington, at Saratoga and at Yorktown. Baldwin and Howe and Lafontaine—our reformers—argued the issues; from the first you have the old colonial warning that if the colonial claims were not conceded the colonies could only be held by British bayonets; and from the first two you once more hear the old American battle-cries "the rights of Englishmen," "fundamental rights" [1]—phrases not entirely rejected by Lord Durham; who, in addition, spoke of the necessity for the presence of troops, if Great Britain desired to maintain "a barren and injurious sovereignty." [2] To every claim for "rights" however, Lord John Russell answered in terms of 1688 and of North and of Townshend. Here is the rigid argument: the monarch is advised

[1] Baldwin to Durham, August 23, 1838, Howe to Lord John Russell, September, 1839. These letters are in Kennedy, W. P. M., *Statutes, Treaties and Documents of the Canadian Constitution* (Oxford, 1930). Cf. Howe to Buller, October 28, 1846, in Martin, C., "The Howe-Buller Correspondence," in 6 *Canadian Historical Review*, pp. 319-20.

[2] Durham's Report (Ed. Lucas. Oxford, 1912), ii, p. 264.

by a cabinet in which the sovereign legislature of the empire at Westminster imposes confidence. How can another cabinet and that that of a subordinate colonial legislature advise him? What if the advice differed? Sovereignty is indivisible—perhaps; sound logic—perhaps; excellent argument—perhaps: all destined to be repeated with such emphasis that every socially and politically wise citizen in the colony was preparing to face another and more ghastly rebellion. No inroads would have been made into the legal rigidity for many a day, indeed the empire might have dissolved, we should never perhaps have heard of Lord Elgin under whom the great future dawned, had not a new philosophy of law wrought changes.

For within Great Britain a new legal theory was abroad which had an extraordinary effect on the constitution of the empire. I refer to that of the *laissez faire* utilitarians, so intimately connected with the name of the jurist, Jeremy Bentham. The end of law is to promote the greatest happiness of the greatest number. Every person is as a rule the soundest judge of his own happiness, and as a result legislation ought only to curtail free individual actions in so far as they are inconsistent with like free actions on the part of others. And just as the old theory of parliamentary sovereignty came in by an economic channel, so Bentham's

theory of law invaded public constitutional law along economic lines and had a profound influence on the abolition of the corn laws in 1846 and of the navigation laws in 1849. The empire now took on a new aspect; and in England's reaction to Benthanism you will notice a point often obscured. It has never been emphasized sufficiently that the stern legalism of empire was only modified at the moment when Bentham's legal theories helped to cut off the colonies from the older mercantilist policy. The year 1849 is a great date in the modern empire—Elgin, Baldwin and Lafontaine—for it brought full executive responsibility to the colonies—but I would ask you to note carefully that the older imperial theory was only broken under the inroads of a *laissez faire* philosophy of law. Even after 1849 all was not plain sailing, and "the rights of Englishmen," "fundamental rights" were not conceded to the Australian colonies until William Charles Wentworth rang the changes on the American revolutionary lawyers, on Chatham, Burke and Camden and spoke of resistance for the defence of fundamental rights against oppression. "The colonists," he said, "must prepare to take steps to secure their rights. The time will have come when the resistance spoken of by Lord Camden as lawful and right against oppression must be made";[1] while *The*

[1] *Sydney Morning Herald*, December 9, 1851.

Times demanded legal concessions, recalling the principles enumerated by the theorists of the thirteen colonies.[1] Fortunately the issues were wisely resolved; and Wentworth joined with Baldwin and Lafontaine—a fact of vast importance—and with the most influential colonial press in proclaiming the unity of the empire. And there was need for this colonial faith, for on all sides English opinion was warped by the logic of the *laissez faire* school. "Wolfe" declared Brougham "crowned our arms [at Quebec] with imperishable glory, and loaded our policy with a burden not yet shaken off." [2] Colonies were wretched millstones round England's neck. *Laissez faire* juristic theory demanded the dissolution of the empire, and Canadian federation was accepted by *The Times* as the inevitable goal to independence.[3]

Canadian federation! In Quebec in 1864 were laid not merely the foundations of the modern Dominion of Canada, but, what is of greater importance, those of a new empire; and the Quebec conference and debates of that year may well one day assume a place of deeper import in history. It is impossible to reconstruct those days without emotion: the sordidness of domestic colonial life; the harrowing tragedy of civil war among a kin-

[1] June 21, 1852.

[2] Brougham, *Historical Sketches,* Lord St. Vincent, p. 307.

[3] Underhill, F. H., "Canada's relations with the Empire, 1857-67," in 10 *Canadian Historical Review,* pp. 106ff.

dred people; the thinly veiled neutrality of political opponents; the scarcely restrained clash of religious and racial animosities. They were brave men, those fathers of the Dominion of Canada, of the stuff of which nation-builders are made, who, where Wolfe and Montcalm fell as foes, achieved, as Frenchmen and Anglo-Saxons, a deeper and more fruitful victory. There is a note I fain would sound: "we are fast ceasing to be dependencies" —parliamentary sovereignty is waning fast—"we are fast ceasing to be dependencies," declared John A. Macdonald. "We stand on the threshold of nationhood and are assuming the position of allies of Great Britain in a great confederacy." That great forecasting by the mastermind of Canadian federation was assented to by all its fathers. Here is a new note: the empire is worth preserving as a great set of community nations. Here is a social note—here is the adumbration of a commonwealth to take the place of an hierarchical legal system. The years have emphasized that faith; but I would have you recall that that faith was a *colonial* faith, born in Canada between 1829 and 1864; born and lived and nurtured, until fortunately it at length received a hearing in Great Britain, as *laissez faire* legal theory gave place to what Dicey has called the collective principle in law; until Disraeli declared that the colonies demanded the preservation of the empire—"they

have decided that the empire shall not be destroyed." [1]

To-day we think of the modern state as a legal society guarding and inspiring beneficial social interests. No one seriously follows John Austin, and sovereignty is as dead as queen Anne. Municipal law is everywhere reflecting newer juristic theories. The individual and his "rights," the abstract reasonable man of the common law, are giving place to the community and its needs. Indeed, the man who is ceaselessly gadding about talking about his "rights" is rapidly being classed among dangerous public nuisances; while we have only to study the modern developments in the law of torts to see how the sense of society is permeating judicial decisions. And so it is in our constitutional law. A vast complex of social forces is at work in our political organizations; and we no longer attribute to the empire attributes which it does not possess. The empire achieves its ends by social consent; and we no longer balance governors against governed, colonies against mother country, but all are equal, as national groups and individual political units, whose interests are mutually beneficial. Now, it seems to me, that when we analyze the theory of the British empire—a legal name first in the British North America Act of 1867;

[1] Monypenny and Buckle, *Life of Benjamin Disraeli* (New York, 1920), vol. v., p. 195.

or of the British commonwealth—a legal name only in 1922—the theory squares with social facts though not indeed with law. The empire has social values, serves community ends, and is a grouping of willing partners in the greatest social experiment of modern times—the old faith of Thomas Hutcheson, the great loyalist, and of Thomas Jefferson, the great revolutionary. For what is this empire? I shall read you some descriptions:

1. "The colonies [are] coördinate members with each other and with Great Britain of an empire united by a common executive sovereign, but not united by a common legislative sovereign."
2. "The Britannic dominions constitute an imperial state consisting of many separate governments, in which no single part, though greater than any other part, is by that superiority entitled to make laws for the lesser part."
3. "So many different governments perfectly independent of one another. This is the only clear idea of their real present situation. Their only bond of union is the king."
4. "All members of the British Empire are distinct states, independent of each other, but connected together under the same sovereign, in right of the same crown."
5. [The king is the] "common sovereign, who is thereby made the central link, connecting the several parts of the empire."
6. "Autonomous communities within the British empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external

affairs though united by a common allegiance to the crown and freely associated as members of the British commonwealth."

Here you have six statements, substantially the same, in which the theory of constitutional right—itself deduced from social facts—as against constitutional law is clearly laid down. The first five quotations are in order, as you well know, from James Madison, Stephen Hopkins, Benjamin Franklin, James Wilson, Thomas Jefferson—the magnificent *colonial* ideals of 1766-76 to which I have referred as beating in vain against the iron bars of legality; the last, as you also know, is from the imperial conference of 1926. Thus the wheel of empire has come full circle. The political conceptions of the most constructive colonists, who would through them have saved the empire before 1776, coincide with the conceptions of 1926; and in neither case do they correspond to the existing law, but in both substantially to existing facts.

I have already referred to my interest in the lawyers and theorists of the American revolution. The similarity between their political philosophy and that of the imperial conference of 1926 is not perhaps accidental. I think I am now betraying no confidence when I tell you that I was requested to prepare a memorandum a few months before the conference of 1926 assembled summing up the constitutional and legal situation, and that the

introduction to my memorandum proceeded along the lines of this lecture. You are of course aware that the discussions of 1926 are about to issue in a statute, already drafted and printed, to be known as the act of Westminster,[1] which, after acceptance by the Dominions, will sweep away the legal limitations—long since dead or easily adjustable—and will bring the law of the commonwealth into line with the workings of practical politics and with the social mind of each Dominion. The details do not concern us; but as I have not previously spoken in public of this act, I should like to take the opportunity afforded me by these lectures to state frankly my position.

The Dominions—Canada—are in truth full masters of their destinies and complete captains of their souls. There may, however, be a danger ahead of a vicious legal circle. The principles which I have attempted to evolve in this lecture disclose that the rigidity of law broke up the first empire and nearly wrecked the second. All dangers from that angle had passed away long before 1926, as responsible cabinet government in each

[1] See *Summary of Proceedings, Imperial Conference*, 1930 (Cmd. 3717); and compare 9 *Canadian Bar Review* (1931), p. 310 for the Dominion-Provincial agreement on the same. Since these lectures were delivered, the statute has passed the Parliament of the United Kingdom (November 27, 1931). For a review of public opinion and of the implications of the Statute of Westminster, see Keith, A. B., in *Journal of Comparative Legislation*, 3 ser. xiii, iv, pp. 246ff.

Dominion had gathered political force with the inevitable widening of its content in custom, in convention, in constitutional give-and-take, informed by social insight and the spirit of a commonwealth. Indeed, I would go so far as to say that the so-called antinomies of empire have existed as conventions reciprocally agreed on. It may be then, that, when the act of Westminster is passed, we shall be ultimately landed in a newer legalism, as customary, and no less exacting and sacred rights, pass into statutory definitions. We may be creating, as the years go on, the hardening atmosphere of law for the human world of flexible constitutional usage, which in the past had so admirably served us. I am pronouncing no verdict on the act of Westminster—time will do that—I am merely looking out on an uncharted legal sea, where we must navigate with more exacting social vigilance, with a more profound sense of social obligation, and with a more searching challenge to the political skill of the several nations.

Constitutional law demands, almost more than any other field of law except perhaps torts, flexibility in interpretation and the danger ahead is that this may not always be forthcoming, as the contemporary traditions and implications and meanings of the act of Westminster pass into history. The less writing down of constitutional rights the more likely are they to react quickly to

III

LAW AND CUSTOM IN THE CANADIAN CONSTITUTION

LAW AND CUSTOM IN THE CANADIAN CONSTITUTION

THE creation of the Dominion of Canada was due, like that of your own republic, to causes internal and external which have become the commonplaces of historians and biographers. I have, then, no intention of reviewing them in this lecture. I prefer to introduce my subject with some remarks on the secret and private conferences at Philadelphia in 1787 and at Quebec in 1864 out of which grew respectively the constitutions of the United States and of Canada. Your conference was shot through with conflicting and at times extremely fissiparous situations, among which the most fundamental were what I may call the principles of the law of the constitution. On the one hand, you had the group represented by Alexander Hamilton who argued for political force and legal strength at the centre; who wished, in the distribution of power and authority, to give to the federal executive and legislature the benefit of the balancings. On the other hand, you had men like Madison whose ideas coloured the final work at Philadelphia. At Quebec, in 1864, we had a some-

what similar situation, with John A. Macdonald, the counterpart of Hamilton, and George Étienne Cartier, the counterpart of Madison. Now, federal government—a federal state—is, at the best, a series of compromises, and the conferences and discussions which attempt to give them form in law are in the final analysis—when the union is at all attainable—only concerned with mechanics, with placing a force to work here, with creating and controlling a power there; with constructing a framework which will so satisfy the interests concerned as to give reasonable hope of national unity and of provincial or state self-governmnent within the unity. The fathers of Canadian federation faced as many local allegiances as yours did. They had to attempt to balance as many forces as had yours, with in addition the solid racial block of French Canadians in Quebec—a distinct culture—forming an inevitable rallying place for every doubting Thomas in the Quebec conference, which passed as a basis of agreement 72 resolutions. These, after acceptance by the federating provinces, were in due course incorporated in a statute, known as the British North America Act of 1867.

The Quebec conference sat in the autumn of 1864; and external events of vast significance gave direction to its deliberations and enabled Macdonald to gain for his unitary and centralizing

constitutional principles far more success than they might otherwise have obtained. Your republic was then fighting out a great constitutional issue. The most tragic civil war in history was desolating a kindred race, and, as the doors closed behind the nation-makers at Quebec, Sherman was on the move from his camp at Atlanta. Macdonald had studied your constitution and your constitutional law for years; and in your civil war he professed to see a testing of its workings, a probing of what he called its intrinsic defect—its errors in the allocation of powers. As a consequence he gained in the final analysis more than Alexander Hamilton.

In Hamilton's well-known plan I would ask you to recall certain features on which he would have relied to strengthen the central government: (i) the senators in the federal legislature were to be chosen for life, and to hold during good behaviour; (ii) the governors, or formal executives, of each state were to be appointed by the federal authorities, with powers to veto state laws acting under federal directions; (iii) the general residue of legislative power was to belong to the federal government.[1] Hamilton failed, Macdonald succeeded; and these three principles of central control passed into the Quebec resolutions and into the subse-

[1] Farrand, M., *The Record of the Federal Convention* (3 vols., New Haven, 1911), vol. iii, pp. 617ff.

quent statute. And he succeeded because, while admiring your constitution as "one of the most perfect organizations that ever governed a free people," [1] he was able to point to its seventy-eight years of workings and to drive home the necessity, as he saw it, of learning from your experience.

We can, then, make a generalization at this point. The Canadian constitution began with a strong bias towards the unitary system—as strong as the circumstances would allow. In the distribution of legislative powers, the avowed aim was to strengthen the central legislature. The appointment of the provincial lieutenant-governors was placed in the hands of the federal executive—they were to be the servants of the federal government; to which, in addition, was given an unqualified power to disallow, within one year, any statute passed by a provincial legislature. In other words, the Canadian constitution began with what appeared sufficiently strong central control over the provinces as would render them, in their executive and legislative capacities, subordinate to the central government, while the ambit itself of their legislative authority was intended to be such as to be under a central veto, leaving, in addition, the vast undefined residuum to the Dominion. *Dis*

[1] In Confederation Debates, February 6, 1865, in Kennedy, W. P. M., *Statutes, Treaties and Documents of the Canadian Constitution* (Oxford, 1930), p. 558.

aliter visum. We now witness in the North American continent a remarkable development in comparative constitutional law. The American republic began with a theory of state rights. To-day, we watch the ever-increasing growth of federal power. Canada began with the scales heavily weighted in favour of the central authority; and to-day the provinces of Canada enjoy powers greater than those of the states of the American union. Political fathers begat political children; and, as in the human world, the children turn out quite differently from the parental ideal. In both federations the most cherished aims of the founders have been nullified.

The process which I have just described has been due in Canada to many cumulative forces and is extremely hard to explain with anything like clearness and precision. Perhaps I might try to point out some features with such emphasis as a lecture allows. First of all, in our constitutional law, the federal political idea never took a logical shape in our institutions. The Canadian senate, as you know, is not strictly a "state" or a "provincial" house. It is a nominated second chamber built on no definite political principle—one of the great failures of Quebec—it represents no clear-cut federal idea. As a consequence the federal idea, as opposed to the "state" or "provincial" idea, has sought from and been granted by political parties

a place in the other organs of government—problems which I shall take up in my next lecture. Secondly, I should like to draw your attention to a most important point—the fundamental principles of judicial interpretation. Our final courts, in ninety-nine cases out of a hundred, interpret our constitution as a statute. They have refused, as happened until quite recently in the judicial interpretation of the Australian constitution,[1] to allow the importation into the constitution of anything not necessarily implicit, to follow American law cases or American precedents, to see in it anything of a contractual nature, or to be guided by its historical origins. They have interpreted it, and given effect to it, according to its own terms, finding the intention from the words, and upholding it precisely as framed. As a statute, they have applied to it most generally the arbitrary rules of statutory construction, which, whatever else they have done, have at times robbed it of its historical contexts and divorced its meaning from the intentions of those who in truth framed it. Finally, the federal party system is organized along provincial lines, national parties are in reality federations of provincial parties, and this fact has accentuated constitutional custom and judicial de-

[1] Kennedy, W. P. M., *Some Aspects of Canadian and Australian Federal Constitutional Law* (Cornell University, 1930). See especially *Amalgamated Society of Engineers* v. *Adelaide S. S. Co., Ltd.*, [1920] 28 C.L.R., 129.

cisions in strengthening our initially strong centrifugal forces of race, religion and geography, which no constitutional law could cabin and confine.

Federalism, as I have said, by its very nature implies a looser national structure than that in a unitary system. And the principles of judicial interpretation which I have just outlined have tended to accentuate the centrifugal forces in our national life. At rare moments, when there is a problem which does not arouse strong federal and provincial passions, the courts will apply a broad principle of "public policy," as when, in 1929, they decided that the word "person" in the constitution included women for purposes of appointment to the senate—a decision completely out of harmony with the principles of interpretation which are usually followed and with the rules of the common law.[1] We are, however, far more strict in interpreting the constitution than are your courts. External matters, the debates on its adoption, the evidence of its founders, and so on are rigidly excluded. A statute it is—not as strictly construed indeed as a penal or taxing statute—but strictly enough to make comparisons with your supreme court almost meaningless. For example, a situa-

[1] *Edwards and Others* v. *Attorney-General for Canada*, 46 T.L.R. 4, and compare Henderson, G. F., in 7 *Canadian Bar Review* (1929), pp. 617ff., and Kennedy, W. P. M., in 8 *Canadian Bar Review* (1930), pp. 706-7.

tion such as occurred in *Myers* v. *United States*[1] where the supreme court invited Senator G. W. Pepper from Pennsylvania to appear before it, as a friend of court, and to present, upon re-argument, the right of congress to impose limitations upon the executive's power of removal, would hardly be likely to occur with us; nor would any of our courts allow resort to the reports of any committees or legislatures in order to gain help for constitutional interpretation. No judge of ours would say in a constitutional case, as he would say in no other case where a statute was concerned, that he wanted every scrap of evidence on its meaning. Your courts approach the interpretation of your constitution, as Professor Frankfurter suggests, from without not from within;[2] and their controlling conceptions are what Pound calls *their* "idealized political picture" of the social order.[3] The Canadian constitution, on the other hand, must speak for itself from within; its terms be reconciled and a reasonable construction obtained.

Might I say, however, at this point that we have adopted and developed in Canada a form of judicial procedure which I believe is not uniform with you? I am not referring to the constitutionality

[1] 272 U. S. 52 (1926) at 176-77.

[2] Frankfurter and Landis, *The Business of the Supreme Court* (New York, 1927), p. 308.

[3] 36 *Harvard Law Review*, 641.

of declaratory judgments recently discussed by Professor E. M. Borchard,[1] but to "advisory opinions," over which the supreme court of the United States and the supreme courts of several of the states differ.[2] In Canada the federal government, or a provincial government may wish to introduce a bill, and there may be doubts about its constitutional powers to do so. It is possible, and fully constitutional,[3] to get the matter before the courts as a stated case—"on reference"—and to receive a judicial opinion on the question of *intra vires* or *ultra vires*. This procedure is valuable and frequently saves much trouble and constitutional litigation, though Canadian judicial and legal opinion is by no means uniform in believing in its wisdom. However, it has helped in the past in some degree to elucidate the constitution, especially in relation to marriage, to liquor, and to fisheries.[4] At the present moment, arguments are going on in our courts on legislative control over the radio and over aircraft; and the opinions deliv-

[1] 31 *Columbia Law Review* (1931), pp. 561ff.

[2] Cf. Hudson, M., in 37 *Harvard Law Review*, 970; and Frankfurter, F., in 37 *Harvard Law Review*, 1002, 1006.

[3] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. 571.

[4] *Attorney-General for Canada* v. *A-G's for the Provinces*, [1898] A. C. 700; *A-G for British Columbia* v. *A-G for Canada*, [1914] A. C. 153; *A-G for Ontario* v. *A-G for Canada*, [1896] A. C. 348; *In re Marriage Legislation in Canada*, [1912] A. C. 880.

ered in these two matters of "reference" will go to the final court of appeal for settlement.

Before attempting to go into any further details, it is necessary for me to explain to you the essence or nature of our legislative bodies. No legislature in Canada is in any sense a delegate—neither the federal or national from the British legislature, nor the provincial from the federal or British legislature; and none are delegates from the people. Every legislature—the federal at Ottawa, the provincial at each provincial capital—within its sphere is sovereign; the powers of each are exclusive and supreme, and may be said to be absolute.[1] It is the proper function of our courts, as it is with yours, to decide disputes over the respective fields of legislative power; but when once these are settled no court can with us inquire whether they have been wisely exercised, or in what manner they are exercised.[2] Legislative supremacy is the cardinal doctrine in Canadian constitutional law. Every legislature in Canada within the limits assigned to it is supreme, and

[1] *Hodge* v. *The Queen*, [1883] 9 App. Cas. 117; *Liquidators of the Maritime Bank* v. *The Receiver-General of New Brunswick*, [1892] A. C. 437; *Brophy* v. *Attorney-General for Manitoba*, [1895] A. C. 202; *Attorney-General for Canada* v. *Cain and Gilhula*, [1906] A. C. 542.

[2] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. 571.

each may delegate to subordinate bodies coercive powers, as is done in applying the vast body of our social legislation. These are no constitutional limitations on a legislature as to the manner of its legislation. There are no bills of rights, no tantalizing problems such as arise with you in interpreting for example such phrases as the "privileges and immunities of citizens" or "life, liberty or property," or "due process of law."

It may be of interest to note that we have no volume of litigation, such as arises under your fourteenth amendment.[1] Canadian judges are powerless to place their interpretation on social policy. No court in Canada could nullify a women's minimum wage law, a law for the standard weight of bread, a law against the exploitation of the unemployed, a law against methods of selling securities—merely because the court thought some fundamental policies or principles were at stake. The Dominion of Canada within its powers and the provinces within their powers have ample scope for social experimentation without fear of judicial nullification. The courts merely interpret and apply social legislation. Nor can the courts read into the constitution any doctrine of immunities. One of the earliest cases in

[1] See Frankfurter, F., *The Public and its Government*, (New Haven, 1930), especially Chapter ii.

Canadian constitutional law was *Bank of Toronto* v. *Lambe* [1] which closely resembled *McCulloch* v. *Maryland*.[2] The attention of the court was drawn to this case and to Marshall's dictum that the power to tax involved the power to destroy. Our final court completely rejected the American reasoning. It maintained that, when a legislative power was clearly granted, the court could not nullify it or deny its existence because it might be abused. Problems, similar to those within your jurisdictions, have arisen over the taxation of government officials. The courts have applied the same reasoning as in *Bank of Toronto* v. *Lambe*. If the power to tax is constitutional, no federal officer is immune from provincial income tax; and no provincial officer is immune from federal income tax.[3] There is only one limitation: the taxing power must not be used deliberately and with discriminatory intent to destroy legal capacities and legal status.[4] Our rule then is extremely simple: given the legislative power, the legislature is free, and the courts must enforce the legislation quite apart from any idea which they may have

[1] [1887] 12 App. Cas. 575.

[2] 4 Wheat 316, 4 L. Ed. 579 (U.S. 1819).

[3] *Abbott* v. *City of Saint John*, [1908] 40 S.C.R. 597; *Caron* v. *The King*, [1924] A. C. 999.

[4] *John Deere Plow Co., Ltd.* v. *Wharton*, [1915] A. C. 330; *Great West Saddlery Company* v. *The King*, [1921] 2 A. C. 91. See Kennedy and Wells, *The Law of the Taxing-Power in Canada* (Toronto, 1931).

of its justice or injustice. If redress is necessary, it lies with the people at an election.

A situation of interest, however, arises over constituent powers. The Dominion cannot at present obtain any alteration of the British North America Act without substantial if not general provincial agreement; but the provinces possess wide constituent powers. To an American audience, in this connection, perhaps the point to which I might with most profit direct your attention is the experiment which has been tried with the initiative and referendum. In 1919 the constitutionality of such procedure was denied by the courts on a technical point; [1] but in 1922, it would appear that it is possible to provide for it by properly drafted provincial statutes.[2] I trust this procedure will not obtain; for if a province can so change its constitution as to deprive effectively its legislature of the traditional processes of building up and shaping a law by full discussion in committee and in the chamber, then I believe it will give such far-reaching meaning to the constituent powers of the provinces as may alter fundamentally our entire scheme of cabinet responsibility. The whole procedure reflects the dying influences of Jacksonian democracy. I do not wish to be misinterpreted. Procedure by initiative and

[1] *In re Initiative and Referendum Act,* [1919] A. C. 935.
[2] *Rex* v. *Nat Bell Liquors,* [1922] 2 A. C. 128.

referendum may have a proper place in your constitutional law, where your executive principle differs fundamentally from ours; but I am convinced that it is impossible to work democratic institutions with a combination of responsible parliamentary cabinet government and direct initiative by and direct reference to the people. The principles are mutually exclusive if not entirely detrimental to political stability. I am glad to say that there is growing evidence that the initiative and referendum will not secure a foothold in Canadian constitutional law.

This general view of provincial powers must at once suggest to your minds the principles which Macdonald borrowed from Hamilton and wrote into our constitution: the federal appointment of the provincial lieutenant-governors and the federal veto power over provincial legislation. Here indeed is an intricate history, and one which serves to illustrate how little can be known of our constitutional law from the mere reading of a document. It is true that a lieutenant-governor is still appointed by the federal government, which can recall and dismiss him; but the courts have long since established his constitutional status. In law he is not the executive servant of the Dominion, he is not the passive instrument of the federal cabinet, as Macdonald meant him to be. Once appointed, and during his tenure of office, he is the

full representative of the crown, endowed with all the necessary powers for carrying on the government of his province.[1] He enjoys as complete and ample authority within his sphere as is necessary for the legal consequences of provincial sovereignty.

The federal veto over provincial statutes was a harder battle. The fathers of federation conceived that the provinces needed guarding. Whatever their motives—and Macdonald's Hamiltonian principles can be recalled—federation began and continued for many years with a clear-cut purpose of treating the provinces as distinctly subordinate to the Dominion, as municipalities; and provincial statutes were vetoed as "unjust," as "inequitable," as "immoral," as "unsound in principle," as "destructive of private and contractual rights"—the federal cabinet virtually becoming a moral censor of much provincial legislation. The problem of the constitutionality of legislation was usually, though not always, left to the courts. In 1892 began the long series of judicial decisions which established the supremacy and sovereignty, within their ambit, of the provincial legislatures, and laid down the rule that the abuse of a valid power could not legally be asserted against the use of the power; which asserted, as was said in a great leading case,

[1] *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, at p. 443.

that against injustice the only remedy is an appeal to those by whom the legislature is elected.[1] From this period a new and parallel principle appears in relation to the veto of provincial statutes: no matter how flagrantly and obviously unjust or oppressive the federal government may consider any provincial statutes, they will refuse to sit in moral judgment on them provided the province concerned has full control over the subject matter, the constitutional power to pass the statute—and that is a question for judicial decision. The legal power of veto remains; but no federal cabinet would dare to veto a provincial statute fully and unequivocally constitutional. Constitutional right and custom govern as against constitutional law.[2]

And now perhaps I am in some position to put before you the distribution of legislative powers. I have spoken of the sovereignty of our legislatures within their ambit. What, then, is this ambit? What are the national, what the provincial powers? You will forgive me when I say that when I came to this point in preparing this lecture I felt

[1] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1898] A. C. 700, at p. 713.

[2] The reports of the federal ministers of justice on provincial statutes are in *Dominion and Provincial Legislation* (Ottawa, 1867. In progress). Cf. Kennedy, W. P. M., "The Disallowance of Provincial Acts" (*Journal of Comparative Legislation*, ser. 3. vi, pp. 81ff.); Davison, J. F., in 7 *Canadian Bar Review*, pp. 438ff., Kennedy and Wells, *The Law of the Taxing-Power in Canada*, pp. 38ff.

that I had undertaken a serious task. The problems are vast, most of my academic and professional time is occupied with them, and there is a great danger of broken views, half-lights for which sheer ignorance is almost better. However I shall try to give you the general legal principles on which I approach any specific constitutional controversy. I shall then illustrate the growth of conventions and law in relation to some specific problems.

First of all, there are certain principles which are quite clear. For example, there is no reserve of legislative power vested, as in the United States, in the people. The whole area of self-government is covered. Every Canadian subject matter on which legislation is possible is assigned to some legislature—either the national or provincial.[1] Then, over education, which belongs exclusively and by very special terms to the provinces, and over the concurrent subject matters of agriculture and immigration we need not delay, as clashes are now rare. It is in relation to subject matters other than education, agriculture and immigration that the tide of legal battle rises and falls to the utter confounding of John A. Macdonald's initial hope that the constitution would successfully avoid "all conflict of jurisdiction and

[1] *Attorney-General for Ontario* v. *Attorney-General for Canada,* [1912] A. C. 571, at pp. 581, 583, 584.

authority," that in any contest over jurisdiction the federal authority "must win." [1]

I can, perhaps, best accomplish my purpose if I give you first of all a fairly clear statement of the great controversial section of the constitution. To the provinces, under section 92, are exclusively assigned sixteen enumerated subjects, and to the Dominion legislature, under section 91, is given power "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that notwithstanding anything in this Act the exclusive authority of the parliament of Canada shall extend to all matters coming within the classes of subjects hereinafter enumerated." Here follow twenty-nine enumerated subjects. Reading the two sections together they *appear* to mean that the provinces possess certain defined, enumerated and exclusive powers, which include a general residuary power over all matters, not specifically set out, "of a merely local or private nature in the province"; and that the general resid-

[1] In Confederation Debates, February 6, 1865, in Kennedy, W. P. M., *Statutes, Treaties, and Documents of the Canadian Constitution* (Oxford, 1930), p. 559. Macdonald to Chamberlin, October 26, 1868 in *Macdonald's Correspondence* (ed. Pope, Oxford, 1921), p. 74.

uum belongs to the Dominion; but the exclusive powers given to the provinces may be modified, curtailed or even destroyed, if judicial decisions in any definite cases draw any of them within the enumerated powers granted to the federal legislature. The conclusion also appears to follow that the federal legislature may not, under its *general* power, substantially trench on subject matters exclusively assigned to the provinces.

Such is the scheme. Every textbook explains the historical origins. Your civil war, as I have already said, urged our constitution makers to reverse your system: the provincial powers were defined, the general residuum given to the national legislature, which was further strengthened by an additional enumeration, which, when properly exercised, might prevail over the provincial enumeration. Contemporary explanations make it obvious that this general residuum was intended to cover all subject matters which in time might become of national importance. Macdonald had no doubts whatever. Viewing the American constitution, he declared in 1864, in urging the acceptance of the Quebec resolutions on his province, that in them advantage had been taken of American experience to avoid any possibility of a war over "state rights." "Here," he said, "we have deliberately adopted a system different from that in the United States. We have strengthened the central

government. We have given the central legislative all the great subjects of legislation. We have conferred on it not only specially and in detail all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest, not distinctly and exclusively conferred on the local governments and local legislatures, shall be conferred upon the central government and legislature. We have thus avoided that great source of weakness which has been the cause of the present disruption of the United States." [1] May I add another quotation? When the Quebec resolutions were given statutory form in 1867 the minister in charge of the bill said: "The real object [of the constitution] is to give to the central government those high functions and sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces, and at the same time to retain to each province an ample measure of municipal liberty and self-government." . . . "I ought also to point out," he added, "that the residue of legislation unprovided for in the specific classification will belong to the central body." [2]

[1] Macdonald in Confederation Debates, February 6, 1865, in Kennedy, W. P. M., *Statutes, Treaties and Documents of the Canadian Constitution* (Oxford, 1930), pp. 558-9.

[2] Hardinge, *The Fourth Earl of Carnarvon* (3 vols. Oxford, 1925), i, pp. 30[illegible], 312.

Words could scarcely be plainer: affairs common to all the provinces, and affairs whatever their *locus,* if of national importance, were to lie with the legislative authority of the national parliament, while all matters of a nature purely local were to belong to the provinces. We can well understand Macdonald's optimism. He believed that the intention of the constitution was abundantly clear. As soon indeed as the constitution began to call for judicial interpretation it would seem that the final court favoured the historical facts. In *Russell* v. *The Queen* [1] the court upheld a federal temperance act prohibiting, except under restrictive limitations, the liquor traffic throughout Canada. This judgment seemed to support the view that, if a federal statute were requisite for the peace, order and good government of the Dominion, it was *intra vires* of the federal legislature, even though it might affect "property and civil rights" granted exclusively to the province. This position did not long survive before a cumulative series of cases beginning with *Hodge* v. *The Queen* [2] and passing down through *Attorney-General for the Dominion* v. *Attorney-General for Alberta,*[3] through *In re Board of Commerce Act,*[4] to *Toronto Electric Commissioners* v. *Snider.*[5]

[1] [1882] 7 A. C. 829.
[2] [1883] 9 App. Cas. 117.
[3] [1916] 1 A. C. 588.
[4] [1922] 1 A. C. 191.
[5] [1925] A. C. 393.

May I take this last case to illustrate to you how judicial interpretation has divorced the constitution of Canada from the historical intentions and origins? I need not go into detail. In this case it is sufficient to say that the constitutionality of the federal Industrial Disputes Investigation Act of 1907 was called in question, under which the federal minister of labour was empowered to appoint a board of conciliation to examine an industrial dispute on the application of either party to the dispute, the application to be accompanied by a sworn declaration that, failing adjustment, a lock-out or strike would probably occur. The Toronto Hydro Electric Commissioners challenged the federal Act and finally established their position, the court declaring that it did not think it "now open to them to treat *Russell* v. *The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such as will meet a mere want which is felt throughout the Dominion, renders it competent, if it cannot be brought under the heads specifically enumerated in section 91." [1] In a word—Macdonald's "subjects of general interest," "questions that are of common import" are in their generality deliberately ruled out of the legislative scheme. The court, however, seemed to believe that they must put some meaning in the words of the constitution

[1] [1925] A. C. 393, at p. 412.

"peace, order and good government of Canada," on "general interest," on "common import," and they decided that these words confined the general residuary power to cases arising out of some extraordinary national peril, where legislation might be required beyond provincial competency. It is to be presumed, then, that, if *Russell* v. *The Queen* is to stand, it must be explained by adding another historical mistake to the situation: that drunkenness was a crying national peril in 1882. As a result we are now in the position that the federal legislative powers are normally only those specifically enumerated in section 91, while the provincial powers are equally defined and enumerated in section 92. The federal legislature can only invade provincial powers in the valid exercise of its enumerated powers; and the real residuum of powers, except in cases of national peril or calamity, either rests with the provinces under their exclusive power over "property and civil rights in the province" or is unprovided for in the constitution. Thus the courts have reversed the whole scheme of 1867. The situation is interesting, but not indeed as hopeless as it might seem owing to the rigidity of our constitution.[1]

In the great social fundamentals we are fortu-

[1] For an apparent change in judicial opinion toward strengthening the federal government, see *Proprietary Articles Trade Association* v. *Attorney-General for Canada,* [1931] A. C. 310; *Attorney-General for Canada* v. *Attorney-General for Ontario,* [1931] 48 T.L.R. 18.

nately secure. Criminal law is an enumerated federal power, thus differing from your law. There is one common uniform law of crime for the whole of Canada. What is a crime in Halifax, on the Atlantic, is a crime right across the country, to the Pacific. This is one of Canada's greatest social assets. We have no struggles over jurisdictions of any nature. If a crime has been committed, for example, in Toronto, the criminal can be arrested in any province and brought at once to Toronto. The procedure is uniform throughout the whole country and is swift and unerring. It is quite common for a criminal to be arrested and tried, and to begin a sentence of many years all inside forty-eight hours. All our judges hold on good behaviour and all are appointed by the federal executive. They fear neither political party, nor political boss, nor political machine;—and we have all three. They hand out criminal justice, and civil justice for that matter, without fear or favour to rich and to poor, to educated and to uneducated, to ministers of the crown and to humble officials. I have seen a man of wealth and social standing and a minister of the crown sentenced on a criminal charge. The scales of criminal justice hang uniformly and with precision in every court in Canada; and no social, financial or political ingredient even for one moment is allowed to enter the balancings. These, however, are matters to which I shall return in

my next lecture. In addition, marriage and divorce belong to the federal legislature. We have one uniform law of marriage for the entire Dominion. A province cannot lay down or change the rules which substantially govern the validity of a marriage. We have one uniform, clear-cut, unequivocal law of divorce, and a province is unable to change it. Thus, then, with criminal law, with the law of marriage and divorce under the control of the national legislature, we are fortunately placed in relation to those great subject matters which touch so profoundly and so vitally the very foundations of national life. So, too, in the financial structure of the nation. "Banking and the incorporation of banks" is an exclusive federal power. As a consequence, the entire system of banking is under strict authority, which the federal legislature revises and reviews at stated statutory periods. Bank failures are extremely rare; and in crises such as the Great War, or in economic depressions such as we are at present going through, we have never doubted the soundness and excellence of our banking structure—a confidence, which since 1867, has never been misplaced.[1]

The provinces control most of the other activities which may interest you—minimum wages,

[1] See Glazebrook, A. J., "Finance and Banking" in *Cambridge History of the British Empire,* vol. vi, pp. 625ff.

factory legislation, protection of workers in industry, child labour, education, public health and the vast mass of social legislation. Here you might expect nine provincial varieties, and indeed such there are; but the principles of social legislation are kept in step by national conferences of social workers, of trade unionists, of doctors, of the religious bodies and such like. These extra-legal national bodies, such as the Social Service Council of Canada, discuss and formulate plans which in due course affect provincial legislation and give it a national impetus, if not always an entirely uniform legal form. In other ways, we work out a national purpose under the strict legal machinery. For example, the Canadian Bar Association brings together the lawyers of the different provinces in an annual discussion, and its Committee on Uniformity of Legislation is carrying out work similar to that done by your National Conference of Commissioners on Uniform State Laws, in promoting uniformity of provincial legislation on subjects outside the constitutional powers of the national legislature.[1] In this way magnificent progress has been made. In many cases diversity of legislation is unavoidable, because the province of Quebec legislates on many subjects within the purview of its own civil code and according to legal princi-

[1] For the work of this committee see the *Annual Proceedings of the Canadian Bar Association* (Toronto. In progress.)

ples borrowed from France. Uniformity of legislation must then be confined to the common law provinces. Here, however, excellent work has been done, for example in statutes governing legitimation after subsequent marriage, adoption, fatal accidents, contributory negligence and many other important social fields. In my next lecture, however, I shall point out limitations on this procedure.

In addition, as you are using methods of reciprocal legislation, or the conferences of state governors initiated by President Roosevelt, or conferences similar to President Hoover's conference for child health and protection, or federal legislation auxiliary to state legislation, or federal financial assistance to state projects, so in a like manner are we. For example, in the strictly social sphere, the federal legislature helps to bear the burden of old age pensions, a subject matter exclusively provincial, as it will before long, I believe, give aid to unemployment insurance. Again, public health is a provincial matter; but the federal government has a department of public health which coöperates with and renders vast assistance to the provinces. Education, as I pointed out, is by very precise and emphatic terms assigned to the provinces; but we have an annual inter-university conference to which every university in the Dominion sends delegates; and the federal legisla-

ture, through the National Research Council, allocates annually many thousands of dollars to select students to carry on assisted researches in the universities of the provinces. At the present moment many special investigations are in operation by students in the provincial universities on grants and scholarships from the federal legislature; and during the years that the Council has been in operation over four hundred carefully selected fellows have been awarded over four hundred scholarships. In this way provincial legal control of university education is robbed of most of its narrowness, and existing faculties in the provinces are used to the fullest extent in order to stimulate and coördinate research and scholarship throughout Canada. So that in many fields the difficulties which constitutional law presents are being surmounted, as they are with you, by an increasing sense of the value of coöperative agencies.

I would not, however, have you believe that all is plain sailing. The rigidity of our constitutional law is causing us many difficulties and these are beginning to be seriously felt with the increasing complexities of social and economic conditions in spite of all the extra-legal activities which, as I have pointed out, are making for united action. The complications of modern industry and of modern business will sooner or later demand

national treatment and national action in the national legislature. Control of industrial disputes, labour conditions, aviation,[1] radio, the St. Lawrence waterway, to mention only a few subjects, are matters under dispute; and wherever you turn in our national life, you find that social and economic policy is in reality a part of constitutional law. I am personally inclined to think that at present provincial rights are too strongly entrenched behind judicial decisions and public opinion to allow any rapid and effective method of constitutional change in the near future. It may be that national cohesion is less strong than it might have been, as the courts have strengthened our centrifugal forces already numerous enough, by a strict statutory principle of construing our constitution. But I am a realist in law, and I venture to believe that, had the courts decided otherwise than they have done, we should have been compelled perhaps to retrace in a large measure our juristic steps, and to arrive where we are to-day before the compelling forces of race, religion, language and geography. Sober realism makes me tell you that no political party in Canada to-day would advocate easy methods of change. I believe we are beginning in constitutional law methods of

[1] Since these lectures were delivered, legislative control over aviation has been declared to lie in the federal legislature (*Attorney-General for Canada* v. *Attorney-General for Ontario*, [1931] 48 T.L.R. 18).

consultation between the federal and provincial governments which will, in the long run, serve us better than law. Indeed the prime minister of Canada, the Right Hon. R. B. Bennett, has just announced that in the near future he will call a Dominion-Provincial conference—a new Quebec conference—to iron out some of the difficulties to which I have referred and to provide for a more effective and more facile manner of dealing with others which may and must arise.[1]

We have mercifully few *doctrinaires* in Canada; few theorists obsessed with ideas divorced from facts. We shall arrive, I think, gradually, in Canadian constitutional law, at custom and conventions through honest consultation and generous discussion such as those planned by the prime minister. It is more than likely that the constitution will remain for a long time unchanged in form; but that we shall mould it in the years as generation after generation of citizens bring out of their treasure house of political experience things both old and new. It is out of a treasury of civic devotion that a nation brings forth the old and the new in constitutional law—the old in finer forms of worth, valued as tried; the new, in garments of conviction, into whose warp and woof knowledge and wisdom and caution and patience and social values and social experience have been woven in

[1] See 9 *Canadian Bar Review* (1931), p. 310.

the secret chambers of human personality. Meanwhile, serious problems confront us, to which I shall draw your attention in the concluding lecture.

IV

SOME PROBLEMS IN THE WORKINGS OF CANADIAN POLITICAL INSTITUTIONS

THE WORKINGS OF CANADIAN POLITICAL INSTITUTIONS

If you wish to study real Canadianism, I think you will do it best in the realm of politics and law. I do not mean to imply that there is not growing up a Canadian culture. This has, however, to fight for its development under the unavoidable influence exercised by your civilization; but in politics Canada, building on its past experience and heir to an unbroken line of traditions, has developed and strengthened a political and legal system suited to the consciousness of a characteristic political nationality. It would take me far afield to trace a growth from the first legislature of Upper Canada, where the governor enacted in a clearing in the virgin forest all the pomp and circumstance of Westminster, to the stately and magnificent buildings at Ottawa where the texture of our national community is controlled, or to the provincial capitals where the vast wealth of the nation and its daily activities find guidance and inspiration. Nor do I intend to refer once more to those legal changes concerning which I concluded my second lecture. I prefer in this, the

final lecture of my series, to draw your attention to some problems which might easily escape your knowledge, and to conclude with some remarks on the deeper aspects of national culture.

Canada, as I have said elsewhere, is one of the most important political laboratories in existence. It has passed from a paternal and theocratic French settlement, from colonial government, from self-government, to full responsible government and nationhood, and it is the first federation in the world which has successfully reconciled the cabinet system inherited from Great Britain with the federal principle borrowed from your experience. I have already told you something of the constitutional and legal evolution of these years; and, while all has not been plain sailing, yet I venture to think that it has one supreme justification—it works. I have told you that quite apart from legal interpretation local pressures have been inevitable. It was perhaps impossible for the men of 1864 and 1867 to see otherwise than through the glasses of strong constitutional cohesion. The colonial life had been petty and bitter and frictional, and, outside, the civil war seemed to point to the need for binding up, as closely as it was at all possible, the political aspirations of the colonies. But economic forces were at work which are too often forgotten in studying Canadian constitutional law. The provinces grew in economic

power; and the advance in provincial wealth and in provincial control over natural resources has accentuated the local as against the national ideal. Indeed, I am convinced that Macdonald's scheme, had it ever been in full working order and applied all along the constitutional lines, would have broken down in an attempt to govern and direct from a centre a vast territory to which nature had not lent anything like geographic unity. I have had students from American universities taking graduate work with me in Canadian constitutional and administrative law, and I have always insisted as a preparation for their work that they make an adequate study of Canadian economics and of geography. I would give you similar advice, if these lectures serve in any way to arouse your interests in Canadian administrative and constitutional law. On the whole, when you have made this preliminary investigation, I believe you will agree with me that judicial decisions in moulding the Canadian constitution have by good fortune fitted into and in a remarkable way satisfied the demands of our physical, economic and racial life.

I am not certain, however, if the future is as safe and secure as we should like it to be. The Canadian federation is, owing to its very origins and to its geographical and human structure, no smoothly working political machine. I would not be frank with you did I not say, quite candidly,

that I fear any further strengthening of provincial rights. The vast undeveloped natural resources of the country, the control of waterpower by some uniform method of administration, the need for national purposes in the growing demands in making labour fluid and in dealing with seasonal work, or in facing the apparently inevitable cycles of business depression and unemployment—all seem to call for a halt in accentuating provincial claims. In labour matters this is at the moment specially evident. As perhaps you are aware, the representatives of Canada to the League of Nations accepted the convention of the League's labour organization in favour of an eight-hour day. Hours of labour, however, belong to the provinces under their exclusive control over "property and civil rights," and it lies with the provincial executives and legislatures to make this labour convention effective. Up to the present consent has not been forthcoming; and in this respect, and indeed in respect to other conventions of the labour organization of the League, Canada is in danger in her social legislation, of falling out of step with other and less favoured nations.[1] Behind modern legislatures is the strength of vast economic interests. Where it is possible, extra-legal activities are at

[1] See *In re Legislative Jurisdiction over Hours of Labour Reference*, [1925] S.C.R. 505; Rogers, A. W., 4 *Canadian Bar Review* (1926), pp. 42ff.

work ironing out difficulties and differences due to the distribution of legislative powers; but when such procedure comes up against the clashing interests of capital and labour there is less possibility for uniform customs and usage to develop, for the interests at the local centres are often too strong to allow progress, and they are all too frequently able to strengthen their economic and financial purposes by an appeal to provincial rights.

I might further illustrate. I doubt whether it would be possible for any province in Canada to raise the age for compulsory school attendance. I do not wish you to think that we have any exploitation of child labour, for in this respect provincial laws are remarkably strict and are on the whole enforced. I merely suggest that the economic forces at work in any province would be strong enough at present to prevent an educational advance in this connection which educationalists throughout the world are more and more urging on their communities. No one province would be at all likely to succeed in attempting to get out of step with other provinces in the labour market.

Here I might mention another matter in which public as against private economic interests exercise a vast control. We have in Canada nine provincial systems and the federal system—ten sys-

tems of incorporating and licensing and regulating and taxing insurance and joint-stock companies. The state of the law is chaotic and the clash over legislative jurisdiction is unending. The advantage to business, both domestic and foreign, would be invaluable, if we could agree mutually to some legal system which would facilitate economic progress. As long ago as 1912 one of the most distinguished lawyers in Canada pleaded for advance along these lines; [1] and yet in 1929 the president of the Canadian Bar Association was making a similar appeal.[2] The truth is that all modern governments want money—the Dominion obtains revenue, the provinces obtain revenue, from the incorporating, licensing, registering and taxing of companies; and my experience is that as often as not economic interests are sacrificed because governments cannot adjust their economic rivalries.

Nor does the clash of jurisdiction in company law affect merely economic progress; social progress is hurt. For example, the province of Manitoba passed legislation to prevent fraudulent selling of shares. The courts decided, in 1929, in *Attorney-General for Manitoba* v. *Attorney-General for Canada,*[3] that, while the province could

[1] Eugene Lafleur, K. C., before the Canadian Club at Ottawa, December 7, 1912.

[2] Hon. Wallace Nesbitt in *Proceedings of the Canadian Bar Association,* 1929 (Toronto, 1930), pp. 104-5.

[3] [1929] A. C. 260.

demand that companies incorporated under the provincial laws should only sell their shares with the consent of a provincial commissioner or board, yet it had no legal power, no constitutional authority, to make such a demand on a company incorporated by the Dominion, and functioning within the province, for such a demand would sterilize the capacity of an incorporation which owed its life to undoubted federal authority.

I should like to quote to you the final judgment of the court delivered by Lord Sumner: "among the objects with which this legislation was framed was the protection of inexperienced residents in the province from the temptation to participate in enterprises, ill-designed, ill-equipped, ill-conducted, and from consequent losses of their savings and disappointment of their hopes. The subject was one well worthy of the attention and care of statesmen." And yet, his lordship and his colleagues could not constitutionally allow the province to apply this "attention and care" this social "protection" in the case of federal companies, because a province must not impair their status and powers. The court looked at the effect not the purpose of the legislation, as indeed it was bound to do, and declared it *ultra vires*. This case illustrates in a forcible way two points: (i) how the present distribution of legislative powers may vitally injure social legislation;

(ii) how the judges cannot, in the interests of
al justice however obvious, save an enactment
ch is unconstitutional.

May I now come to matters less technical?
donald and his colleagues gave to Canada
ish institutions in a federal framework. In this
ect they had doubtless sound political instincts
ch have saved us perhaps from much theory
enabled us to build on past experience; but
have for the federal popular house the singu-
r inappropriate name of house of commons;
while it was impossible to call the second
nber the house of lords, yet it was not created
he federal plan. It represents four great geo-
hical sections; and in essence the intention
that, being based on a property qualification
on appointment by the crown and on life
re, it should reproduce the atmosphere and
tions of the house of lords. The senate is not
never was a serious and important part of our
ral government and the office of senator com-
ds none of the social respect and aristocratic
tion which, as far as conditions would allow,
to attach to it. Indeed, I am glad to tell you
in Canada the house of commons has re-
ted that no further titles of honour should be
erred on Canadians.[1] This request still

[1] eith, A. B., *Responsible Government in the Dominions* a., 2 vols. Oxford, 1928), ii, pp. 1020-21.

stands; and it represents, as does the attitude towards the office of nominated senator, the sound wholesome general will of the Canadian community. The senate as an institution fulfils one function. It furnishes a recurring theme for political oratory. There is no provision for deadlock; and as each party when in power fills vacancies in the senate from its own supporters, it frequently happens that the senate and the house of commons are of a different political colour. As a consequence, "senate reform" appears on party programmes with a cyclical insistency. However, as the appointees are usually old men to whom political rewards are due, death soon adjusts the differences between the two houses. Voices continue to cry here and there in the wilderness of political theory; but interest dies down, the reform promised is forgotten until a government is defeated. Then, with no sense of humour or of political reality, the old speeches are once more repeated, the old promises made: and they too soon pass into political forgetfulness, until the next cycle finds them again in evidence. "Senate reform" in Canada is merely a plaything of parties—one of the standing jokes of electioneering campaigns.[1]

The weakness of the conception and of the organization in the senate has had, however, a most

[1] The best study of the Canadian senate is Mackay, R. A., *The Unreformed Senate of Canada* (Oxford, 1926).

important and far-reaching effect on our government, and it is one which is extremely likely to escape foreign observers, as it lies exclusively outside law, though it has in effect all the binding force of law. The working executive in Canada is the cabinet which, *ceteris paribus*, follows the traditional lines of political construction, and is guided by the traditional usages and customs. The prime minister is the central figure, and in theory he is free to choose his colleagues, who may reach seventeen or twenty in number—a public meeting—as contrasted, in the light of relative populations, with the group which assists your president or the prime minister of England. The Canadian cabinet is always far too large to function well as a thought-organization; and every suggestion for reform in our institutions contains the proposal for reducing the size of the cabinet. The prime minister of Canada, however, is not free, as is the prime minister of England, or perhaps your president. The failure to federalize the senate has tied the hands of a prime minister from 1867 to the present moment—a condition actually foretold during the confederation debates of 1865.[1] From the first Dominion cabinet to that in power to-day at Ottawa, the federal idea is evident. The

[1] Dunkin in the *Confederation Debates of 1865* (Quebec, 1865), p. 497. See also Kennedy, W. P. M., *Statutes, Treaties and Documents of the Canadian Constitution* (Oxford, 1930), p. 606.

provinces as such claim and succeed in getting representation in the national executive.[1] In other words, the cabinet, not the senate, represents the federal aspect in our central government. On the top of this binding constitutional usage, others of a worse nature have arisen, and they will remain. The French Canadians, Anglo-Saxons in Quebec, and Roman Catholics in other provinces have more or less established claims to representation in the federal cabinet, which has remained from 1867 to 1931 a reflection of provincial, racial, and religious groupings. Thus it happens that the executive government specially placed in power to benefit the whole nation is generally a balancing of interests, which calls for political management of no mediocre order. A prime minister may find himself forced to choose a colleague because he is the sole supporter of his party elected in a province, although his claim to cabinet office is the uniqueness of a position due to local reasons or to local political organization. A prime minister may find himself compelled to bring to the council chamber men endowed with neither political wisdom, nor national outlook, nor the capacity for them. The usages are binding, no party leader

[1] Cf. the prime minister, the Right Hon. W. L. Mackenzie King, in forming his cabinet in 1921: "The federal spirit of our constitution [will be] most acceptably recognized by according representation in the cabinet, so far as is possible, to all the provinces of Canada" (*Toronto Daily Star*, December 30, 1921).

dare reject them; and it seems likely that Canada must continue to tolerate a national executive which is only national in name, and one merely held together by the ties of office. Writers often praise Canadian political wisdom and skill in combining parliamentary government with federalism. We doubtless have succeeded; but our success must be attributed largely to the fact that we have federalized the national cabinet.

Up to the present, however, Canada possesses in cabinet government something for congratulation. We have avoided government by specialists, and we have kept our democracy almost free from one of its greatest dangers—the bestowal of responsible cabinet office on a man because he has special qualifications for it other than those of large outlook, general education, width of vision, contact with public opinion and that adaptability of personality which belongs to a good administrator in getting work done. In Canada, we have, so far, combined the layman and the expert in government in some degree along the lines to which President Lowell has given such high praise.[1] I consider this our greatest achievement so far in politics. In the face of the expert's ever-widening sway; in the face of the growing faith in him in every sphere of Canadian, and indeed of North

[1] Lowell, A. L., *Public Opinion and Popular Government* (1913).

American life, we have, as yet, been able to avoid choosing the members of a cabinet for their technical qualifications. The causes may be traditional, they may be social, or the outcome of party organizations—they are I believe elusive—yet it is of extraordinary interest that a Canadian cabinet is not a school of technicians. That it has its defects no Canadian would deny. That it does not tend to national efficiency, to machine-like precision, to economy, to national self-examination is more than evident. But it has proved in Canada, as it has so emphatically proved in Great Britain, that it can stand the strain of crises, that it can save the nation in an abundant degree from bureaucracy and red tape, that it can hold the balance fairly between the political chaos of mere amateurism and the beautiful prison garden of the expert. I would not be honest with you did I not say that there are already calls for the skilled man in cabinet office; and signs are not wanting that Canadians are beginning to seek salvation, not in their own political ability, but in the specialized ability of ministers.

In so far as this conception gains ground in Canada it will be at the expense of whatever wisdom may be drawn from political experience; and certainly it will be at the expense of the growing efficiency of the civil service. Our executive government is to-day built on that peculiarly British

combination—the responsible layman holding a cabinet portfolio by parliamentary support, and his technical assistants holding office without political responsibilities and during good behaviour. Social conditions are, I fear, making for change. The finest type of lay mind does not today go into politics in Canada, and a political career does not open up such opportunities for success as in the early days of federation. The consequence is that a modicum of specialization—even achieved by amateur methods and at times savouring of quackery—is becoming a qualification for cabinet office. Thus it may happen that a cabinet, in place of being a clearing-house for public opinion, a pedestal from which to view steadily the whole national life, may become the scene of clashing specialization—in itself sometimes excellent, but as often as not crude and untrained. We are in danger in Canada of experiments in politics singularly unrelated to each other; while special projects of national importance are postponed which in an executive atmosphere of wide and non-specialized discussion would have achieved success. Perhaps the gravest danger ahead is that mediocre civil servants will cater to a minister who is, or is reputed to be, a specialist, and that the minister may over-estimate his own ability or be deceived in his judgments. The best civil servants —and they are rare—will resent real or reputed

specialization in a minister. The decay of traditions of tried worth is not as yet wholly evident; but I see ahead, if we are not politically vigilant, changes which may be of real detriment to our institutions.

Whatever these dangers, there at present exists a serious defect in Canadian cabinet government, in that each cabinet minister is not provided with a parliamentary under-secretary, who would relieve him, not only of the unfruitful activities of his office, but of much administrative and mechanical organization. One of the most striking things at Ottawa is the extraordinary business of a minister quite outside his duties in parliamentary debate, or in the cabinet. He is called on for decisions on things of trivial importance; and responsibility is frequently driven to such a degree as to retard or to defeat its own ends. Countless interviews, countless delegations occupy time and energy which a parliamentary under-secretary could well supply. Our cabinet ministers are not left free enough for those larger decisions of policy, for drawing those great lines of national activity, which are the tasks of statesmanship. Our Canadian cabinet ministers scarcely find sufficient time for thought, for judicial discussion, for that necessary retreat within themselves which is the secret of creative work, of self-discipline and public virtue. The cabinet's political canvas is too crowded

with detail, and frequently the picture is never fully conceived. There is a tendency to live from hand to mouth, to see everybody, to mix freely, and to trust the inspiration of the moment. On the other hand, in spite of all limitations and of obvious signs of changes which may not be for the best, Canada has had a remarkable line of great ministers. Macdonald and Laurier would have graced any legislature in the world; and for political skill, for parliamentary ability, for scholarship and learning our prime ministers since Laurier's defeat in 1911 have been men of remarkable accomplishment. We have had our share of weak cabinets, of weak ministers, and social developments do not promise a great advance in the future. But we must believe and trust that the cabinet achievements in the past will not fail to inspire our citizens; and that, above all, the magnificent traditions of high public virtue, of public honesty and of general political incorruptibility in the Canadian cabinets will continue in the days to come to fertilize our executive life, whatever changes in organization and in qualifications the years may bring.

At this point, I necessarily must say something of our civil service—the experts in our system of government. For the history, I need not go into details, as you will find them in the publications and books of Dr. R. M. Dawson, set forth with

sound scholarship, with political realism, if at times in a satirical and caustic style.[1] I desire rather to place before you less technical and certainly less critical observations. It is a commonplace that we have been influenced by Great Britain in our administrative organization, and it is equally true that Canada falls miserably short in what is beyond controversy among Great Britain's outstanding administrative achievements. Theoretically, and indeed to a very large extent in law, the civil service is out of politics; and when we recall in Canada the not far-off days of rampant political patronage and political jobbery we have certainly advanced in a remarkable way. Indeed there is in general an ever-growing public condemnation of the system of political spoils, and this improvement has re-acted emphatically on the civil service. Notwithstanding all the advances, the Canadian civil service does not command anything like the respect or confidence which it ought, by the nature of its functions, to enjoy. I have not the time to examine for you all

[1] "The Canadian Civil Services before Confederation," in 5 *Canadian Historical Review,* pp. 118ff., "The Canadian Civil Service, 1867-1880," in 7 *Canadian Historical Review,* pp. 34ff., *The Principle of Official Independence* (London, 1922); *The Civil Service of Canada* (Oxford, 1929). See also Right Hon. Sir Robert Borden, "The Problem of an Efficient Civil Service," in *Annual Report Canadian Historical Association* (Ottawa, 1931), pp. 5ff. This discussion is specially valuable, because it is based on a prime minister's experience.

› reports and investigations—good, bad and in-
ferent—to which the civil service has been sub-
tted. In my opinion, the greatest necessity is a
nplete reduction of the staff, a weeding out of
ıch mediocrity, and an elaborate revision of the
aries. We do not attract the best type, the
est of our young men, as the civil service in
eat Britain does. The whole system of examina-
ns could be made much more exacting were
ver rather than knowledge tested, were Canada
offer to its young men salaries in some real re-
ionship to those which they might reasonably
›ect in other walks of life. These are our funda-
ntal defects: too many appointments; too
ch the appearance of being busy; too much
diocrity; too low salaries. We have in our serv-
men who would adorn any administrative
ce, men of high skill, of expert knowledge, and of
t-class technical ability; but we require direct
l indirect reform. There is a well-merited cry
Canada to-day against our enormous expendi-
es on the civil service—and they are enormous
l out of all proportion to our population—al-
ugh in a nation governed as ours is, administra-
› expenses will always be higher than in a con-
dated and thickly populated country. The de-
nds, however, for reform and improvement in
civil service are urgent and real, if at times
ggerated and ill-informed; and they will not

come by commissions, by reports, by investigations, but only by a conscious conviction that we must spend money to save money, and that the task of skilled political administration calls for adequate rewards. Canada demands much of its civil service, and the surprising thing is that so much is given. I doubt if our political experience can long continue the strain of inefficiency. And unless Canada is prepared in the near future to deal more generously and at the same time with more constructive criticism, there is a danger that the traditions which the finest civil servants have created will cease to inspire. If that is so, we may find that it will be impossible to withstand the advent of the expert in the cabinet, and that one of the fundamental principles of our executive government may disappear.[1]

The legislature itself, like the cabinet and civil service, reflects in a marked degree the inherited traditions. Year after year at Ottawa are reenacted the ancient pageants of parliamentary history, with ceremonial and ritual which recall many an old world scene. There, the speaker demands, as in the mother of parliaments, the ancient and immemorial rights and privileges of the commons; there is introduced on the opening day of each

[1] Cf. Frankfurter, F., "Expert Administration and Democracy," in *The Public and its Government* (New Haven, 1930), pp. 123ff.

session a blank bill which, as at Westminster, symbolizes a struggle long since dead—the right of the legislature, as "the high court" and "grand assize" of the nation, to debate any matter whatever. Here the speaker of both the senate and the house of commons, whatever his party affiliations, exercises calm, judicial and nonpartisan sway; and the Canadian legislature can boast a long line of speakers who have interpreted the rules and regulations of the houses with remarkable objectivity. Seldom is there a serious clash; and when one occurs it is due as often as not to a member's stupidity or ignorance. Both houses are extremely jealous for the prerogatives of their speakers, who, in turn, have well merited the confidence placed in them. Scenes of violence or disorder are so rare that they create public astonishment and severe public condemnation. In parliamentary discipline and decorum there is little to be desired.

I have not time to enter into the details of personalities or of the debates; and indeed any reference to them would convey an entirely false meaning, as there are shades of values too fine to be drawn in a few words. I should, however, in this connection, like to draw your attention to some matters of interest. Few of the members of either house are professional politicians, giving their entire time and activities to party or to parliament. The houses represent fair cross-sections

of Canadian life, men and women actively engaged in professional or other work, with now a few older men, who having accomplished their ends in the professional or economic world, contribute to the legislature a static conception of life, of politics, of things in general and of Canada in particular. A minority alone grapples with the affairs of the nation. Most members speak seldom. They are party-men, and their presence in the division lobby is their highest political function. They all, however, share the overwhelming burden of appeals, of interviews, of special pleadings which pour in to them from their constituents. For there continues to exist with us the idea that offices and favours and rewards can be obtained by influence, and that there should be ways and means of making money other than through merit and honest toil.

The cabinet exercises the strongest and most rigid control over the house of commons. Not merely do the vast financial undertakings of the country and all matters of taxation originate by law with the executive; but it formulates the business time-table of the house, and there is little chance for a bill which the government in power does not favour or father. This sway of the cabinet—its severe and exacting supremacy—is maintained and nurtured by the party system which exercises an ever-increasing authority.

Members of the legislature supporting the government in power seldom deviate from their allegiance. To do so imperils not only their recommendations and patronage for the time being, but their political future. I can recall only a few cases in which members have changed their political allegiance. Indeed in Canada, as in the United Kingdom, cabinet government in its true political essence is largely a theory. In Canada a cabinet is the servant of the house of commons, holding power only as long as it can command a majority —such is the theory. In fact, if a cabinet has a small working majority, it is virtually the master of the house, not its servant; and a prime minister can, as a rule, bring into line the wavering or doubting among his supporters by the threat of a dissolution. The weak-kneed know that, in that case, they will lose the support of the smooth and efficient party machine; and discipline exerts itself. Indeed, nothing is more remarkable in Canada than the autocratic power of the cabinet in every legislature in the land. I am inclined to think that the growth of political groups owes not a little with us to a reaction against cabinet supremacy. A member of parliament, who supports a cabinet in power, is hardly a free man. He is infinitely removed from Burke's ideal of the representative of a constituency, and is becoming more and more a delegate. It is not without sig-

nificance then that, in helping to draft the constitution of the Irish Free State, I found political opinion so strong that in that constitution it is laid down that the cabinet must be elected by the house of deputies and that no cabinet which has lost the confidence of the house can advise a dissolution. It is something worthy of more than passing mention that, whereas in Canada, on whose experience we built the Irish Free State, cabinet discipline has to a large degree nullified the theoretical excellencies of the British executive system, it remained for the Free State to bring back and to revitalize the essential principles and fundamental conceptions of cabinet government, making the cabinet, not merely in theory but in fact, the servant of the elected chamber.

There is another aspect of our legislative machinery which might easily escape your attention —I refer to the actual workings of our election system. The country is divided, for purposes of a federal election, into two hundred and forty single-member constituencies, which since 1903 have been redistributed with an increasing honesty. Gerrymandering which was once an old sore—a political game played with consummate skill—has virtually died out before the demands of public opinion. In each of these constituencies one member is returned whatever his majority. The man or woman who gets the most votes is the

member until the next election. As a consequence it frequently happens that a member may get more votes than each one of his several opponents, but many less than the total votes polled against him. It is thus possible to have a cabinet in power with a majority of the votes of the citizens against it—as it is in your presidential elections—or for seats to be held by members who in truth have polled far fewer votes than the total votes polled against them. I should like to ask your patience while I illustrate this aspect of our parliamentary system—whose theory is government by a cabinet enjoying the support of the people. I have spoken of the changed position of the cabinet. Let us now consider how the representative idea works.

I should like to draw your attention to the general election of 1925 and to that of 1926. In 1925, in the province of Alberta, the conservatives polled more than a third of the total vote, and obtained three members; the liberals seven thousand fewer votes, and obtained four members. In 1926, in the same province, the conservatives polled only eleven thousand votes less than the united farmers, yet the latter gained eleven seats and the conservatives one. In Manitoba in 1926 the conservatives polled over forty per cent of the total vote cast and did not return a single member. In Saskatchewan, both in 1925 and in 1926, a similar situation was disclosed. In neither election did the

conservatives gain a single seat, yet in both elections they polled a fourth of the total vote cast. The anomalies in Ontario and in Quebec are equally remarkable. In Ontario, in 1925, the conservatives polled a little over half the votes and obtained sixty-eight seats; the liberals polled a fourth of the votes and got twelve seats. In Quebec in 1925 the liberals polled a little over half the vote cast and gained sixty seats; the conservatives polled a third of the votes cast and gained four seats. In the same province in 1926 the total conservative vote increased thirteen thousand; but, as before, only four seats were gained out of sixty-five. In 1926, the conservatives actually polled throughout the country eighty-three thousand more votes than the successful liberal party, and yet they gained twenty-five seats less in the house of commons.[1]

I do not bring before you these details for any purpose of propaganda, but merely to illustrate the workings of so-called representative institutions. Reformers raise their voices for some form of proportional representation, and they are met with reasons similar to those advanced in your own country and in the United Kingdom, where, indeed, as you are doubtless aware, experiments

[1] For a complete analysis of the elections of 1925 and 1926, see *Proportional Representation Review* (Philadelphia, October, 1927), pp. 69-75.

have been tried in certain parliamentary constituencies and successfully in certain aspects of local administration. In Canada, in addition to the general objections usually advanced, there is a fear that proportional representation would tend to increase political parties and groups, and that it would make government infinitely more difficult were further heterogeneity introduced amid the clashing interests at present existing and demanding in Canadian government a skill, almost superhuman, in delicate and refined political balancings.

It is with pleasure that I now turn from criticism, explicit and implied, to a department of Canadian administration which will bear comparison with anything in the world—the Canadian judicial system. We have, it is true, failed to find any ideal way of choosing judges. At times they are chosen from strong party supporters, and at times there is much wire-pulling and lobbying over vacancies. Perhaps this is inevitable in a democracy; and idealists, who lament the field of choice, too often forget the long line of great and internationally famous jurists who have taken judicial office as a reward for party support. That there is room for improvement in legal ability, and above all in experimental courage in those legal fields where the judiciary can be free, I would not deny. The salaries are far too small to attract

the finest lawyers in a country where wealth and material prosperity so strongly influence social values. Yet one thing we have avoided—indeed it has never once been suggested—no judge in Canada is elected, or appointed for a term of years; every judge holds during good behaviour as the king's judge. All courts are the king's courts, and so, with an ascending scheme of courts, we have one judicial system administered by men who cannot be removed from the bench except by a joint resolution of both houses of parliament; and no such removal has ever taken place and no necessity for it has ever arisen. Appointed by the crown on the advice of the cabinet, holding at the pleasure of the crown, and organized on a national system, we have secured judicial independence and judicial purity. It is one of the most remarkable things in Canadian life to notice the national respect given unequivocally to the Canadian judiciary. It is not due to reverence for high juristic attainments or for admirable social experimentation in judgment—though we have some judges of remarkable legal gifts and a generally high average of ability. Rather is it due to the fact that, when once a judge ascends the bench, no matter what his previous career, he becomes the embodiment of a system of impartial justice to which the Canadian public would tolerate no detriment.

I have, in a previous lecture, told you of the

judicial fearlessness which belongs to our judiciary, their fine professional traditions and their sterling honesty. I should like to say here that our legal procedure is simple and free from cumbersome technicalities. Half an hour is time enough to impanel any jury, and cases are handled by counsel with a growing sense of learning and legal ability. The practising bar have high moral standards and their decorum in court is remarkably good. There are black sheep: men who know enough law to do evil and to escape; but discipline is always improving and the general trend is upward. The everyday, pedestrian, officers of the peace are a fine body of men. We have had grave and disappointing scandals among the police, and we cannot hope entirely to avoid them; but I can say that the police force throughout Canada is informed with as high a sense of duty and of public service as any in the world. Our judges, our lawyers, our juries, our police officers are a combination of which we are justly proud. Our courts protect us, as I have said, with a fine objectivity, in criminal and civil suits. They guard our common law rights; they keep a vigilant eye on the advances of administrative boards and functionaries and hold them strictly within their powers; and they nullify any attempts on the part of the executive to act illegally. Amid much that is commonplace and inefficient; amid the subterranean prac-

tices of party patronage, of political logrolling, of those thousand and one evils which only a greater vigilance than we have yet given can diminish—Canadian justice lifts its head, sublime and pure, above the sordid tendencies which seem to mark the paths which democracies prefer to tread. Where there is justice there is hope. Only the other day a foreign criminal asked to be allowed to speak in court: he publicly thanked the judge for the impartial justice meted out to him for his crime—he had just been condemned to death for murder.[1]

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I began this lecture by saying that the real essence of Canadianism will best be sought in our political and legal institutions. I have emphasized throughout these lectures that institutions and law, if they are functioning with any degree of success in advancing human progress, must reflect the community. What then is the Canadian community? In conclusion, I wish to point to some things, which, viewed superficially, might seem to contradict my optimism, or indeed to nullify my whole position.

Of the four original federating provinces, Que-

[1] For the workings of Canadian constitutional law the best introduction is Riddell, Hon. W. R., *The Canadian Constitution in Form and in Fact* (New York, 1923), which contains valuable and suggestive notes.

bec was French; and what it was in 1867, its three million odd people remain to-day—a group culturally apart from the rest of Canada, from the rest of North America, indeed from the rest of the world. In spite of enormous industrial penetration from Ontario and New York, in spite of vast economic enterprises, in spite of the insistent call of material things, Quebec is anchored deep in the things which are not ephemeral. With a high birth-rate, with a phenomenal loyalty to the strictest traditions of family life, with one of the lowest criminal records in the world, with a sense of peace almost medieval, Quebec stands as the guardian at our gate of all those things which the modern world affects to despise. The values in Quebec are the eternal values. Quebec possesses, in the most profound and deepest sense, a soul. Nor is this true only in what for want of a better word I may call the spiritual sense, it is true in the broadest cultural sense. Art and music, literature and science, have a deeper meaning to the educated French Canadian than to his corresponding Anglo-Saxon fellow countryman. In the pleasant villages and on the quaint Norman farms, there still remains in abiding security that indefinable something which makes for contentedness, for charm, for beauty, for the deeper meanings and the more exacting standards. Here then is a nation within a nation. Of social and business contacts there

are many, and they are the obvious contacts common to North America; but in spite of them all Quebec remains apart and alone in the deep cleavage of its outlook from that of the other provinces. As far as I am concerned—and I represent a great body of Canadian opinion—Quebec contributes to our life some of its finest and most valuable characteristics. Built on ancient rocks, rooted deep in the tested traditions, finding in life a school of divine purposes, holding fast to the things which escape statisticians and quantitative sociologists, French Canada gives to the modern Dominion, in an age of machine-made culture, the inestimable gift of a spiritual personality.

The other federating provinces of 1867—Nova Scotia, New Brunswick, Ontario and a little later Prince Edward Island—were and are largely Anglo-Saxon in origin, strengthened, and in some cases actually created, by the thousands of loyalists who came north after the American revolution. They have never lost the background of those early days—a mild puritanism, a conventional point of view, and an inherited and remarkable skill in the North American methods of living. Their standards of value are North American, and outwardly at least they differ but little from northern New England and the northern Middle West. Their outlook on life is the same, their interests are the same, their economic ambitions are

the same; and while they profess to appreciate the spirit and the ethos of Quebec, yet in their hearts they are somewhat critical of a province which does not march to the same tune and does not see life in terms of material prosperity.

In the western provinces, you pass into yet another world—a distinct world—a melting-pot: descendants of older settlers from Ontario, or Quebec, or the maritime provinces contribute, with settlers from every country in Europe, to the development of a western type, which we Canadians of the middle or eastern provinces at once recognize as individual. There is a freedom, a morale, a spirit of adventure, a sense of experimentation, a desire to take risks, a boundless faith, a shrewd business instinct, a neglect for tradition and inherited customs, which, above and beyond prosperity or depression, have passed into the blood of the men and women of the prairie. I am not going to weary you with statistics. It is quite easy to get all the figures and census reports and blue books and jeremiads and lamentations, and to form for yourselves a picture of the Canadian west. Your results will be just as valuable as anything I could tell you, drawn from the same prosaic and emotional sources—hopes and fears; faiths and misgivings. And yet, behind these impressions drawn from statistical sociological astrologers and the timorous "hundred per centers," there lies a proc-

ess of assimilation which is secret; and, in its very secrecy, is too elusive for quantitative or propagandist or emotional analysis. Where it is possible to see dangers—say in our western survivals of Icelandic sagas, Teutonic folk-lore, Polish music, Southern European festivals, the native dramas of Europe—the citizen with deeper insight can welcome the gifts of diversity in cultural custom let loose and unchained amid the glad joys of political and personal freedom. I have no misgivings about the west as it is to-day, provided we choose our emigrants; provided above all that we do not subsidize them; provided we welcome the sturdy, clean-living, future-seeking, ambitious settler of sound American and European stock. If we cannot make Canadians out of these—as we have done in the past—we shall not succeed in making Canadians from the immigrant of British stock who has not these qualities. A British immigrant is not necessarily welcome because he is British. If Canada can only think of immigrants in terms of their potential qualities, and apart from political and racial adjectives, we need not fear the future, as we do not fear the present.

For behind all this cultural diversity, accentuated, as I have suggested, by geography and race and religion and law and jurisdictions, there is emerging a Canadian community with roots ever deeper in a sense of common achievement and of

common purpose. It is elusive as are all cultural qualities. It is not evident to the superficial observer. It lies consecrated in common toil, in common political hopes, in common sacrifices, in common faith in the nation and in the commonwealth. Outwardly Canada can never have—and it is one of the things for which to be most thankful—that refined and exclusive and over-accentuated culture which distinguishes one nation in Europe from another, and in turn sets each in armed antagonism against the other; but Canada can have a cultural personality as distinct as that separate political and juristic integrity which I have attempted in these lectures to portray. In the common schools and in the democratic universities of the Anglo-Saxon provinces, of Quebec, of the culturally diversified west, the word "Canada" has a content and calls for a response which is hard to define and is at the same time all the more real because it defies definition. To-day, we, whose faces are towards the setting sun, are inclined to make estimates by old standards, to seek the living among the dead, to moan that the valley of miscellaneous dry bones can never come together as a living unity. And yet, these lectures will have failed if they do not disclose to you that, with all the imperfections and shortcomings in our constitutional and administrative law, there is a Canadian purpose, a Canadian instinct, a Canadian

destiny, a Canadian nation, otherwise our law and institutions would never have achieved that position of social security and that promise of accomplishment for the social purposes of Canada which I profoundly believe them to possess.

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